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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 259.

THE REPUBLIC OF COLOMBIA, APPELLANT,

vs.

THE CAUCA COMPANY AND THE COLOMBIAN CONSTRUCTION AND IMPROVEMENT COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLEES.

COWEN, CROSS AND BOND,
Solicitors for Appellees.

JOHN K. COWEN,
JOHN W. BEAUMONT,
EDWARD H. MURPHY,
of Counsel.

JOHN MURPHY COMPANY, PRINTERS AND PUBLISHERS, BALTIMORE.

28972

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INTRODUCTORY.

This is a case wherein the Republic of Colombia was complainant below, and the Cauca Company and the Colombian Construction and Improvement Company, corporations created under the laws of West Virginia, were defendants.

On December 15th, 1897, the complainant filed its bill in the Circuit Court for the District of West Virginia for the purpose of cancelling and setting aside an award made October 22, 1897, in favor of one of the defendants, the Cauca Company. The defendants duly answered and on June 8, 1898, the Cauca Company by leave of Court filed a cross bill against complainant for specific performance and payment of the award. Answer thereto was filed, general replications filed by the respective parties to each of the aforesaid answers, and testimony was taken. On March 11, 1901, a decree was passed by the Court that the award be approved, ratified and confirmed as and for a valid and binding award for and up to the sum of $357,404.02 in gold coin of the United States of America, to be paid by the Republic of Colombia to the Cauca Company, in the City of New York, on the 26th day of January, A. D. 1898, with interest thereon from said date; and that certain items in said award aggregating $94,644.91 be disallowed, and that a $10,000 special allowance to the counsel of the Cauca Company be also disallowed.

On March 18th, 1901, the complainant took an appeal to the United States Circuit Court of Appeals for the Fourth Circuit. Pending this appeal complainant applied to this Honorable Court for a writ of Certiorari to said Circuit Court of Appeals, which application was denied on May 13, 1901. (181 U. S., 619.)

On July 29, 1901, the defendant Cauca Company took a cross appeal to said Circuit Court of Appeals, from so much of the decree of the Circuit Court as disallowed the items aggregating $94,644.91.

On February 4th, 1902, the Circuit Court of Appeals filed a *per curiam* opinion in which it concurred with the conclusions of the lower court; and on February 8th, 1902, decreed that the decree of that Court be affirmed with costs.

On February 10th, 1902, the complainant took the present appeal to this Honorable Court.

Thereafter the defendants moved to dismiss this appeal for want of jurisdiction, filing with said motion a brief in support thereof. This motion was postponed for argument to the hearing on the merits. Counsel having fully set out in said brief the points and authorities in support of said motion, the present brief, therefore, relates only to the merits of the controversy.

The record in the case is very large, containing over thirteen hundred pages of print, being devoted principally to a transcript of the arbitration proceedings, which was filed by complainant and admitted by defendants to be correct. As stated in the opinion of the Circuit Court the decision of the case depends more upon a proper finding of the facts than on the determination of the law. The essential facts being very many, a fair statement of the same within a narrow compass is hardly possible. Counsel therefore beg the indulgence of the Court for consuming so much space in the following statement, which could with more propriety be termed an abstract of the voluminous record.

STATEMENT OF THE FACTS.

On August 27, 1890, one James L. Cherry, a citizen of the United States, entered into a written contract with complainant, which contract was ratified by complainant's Congress on October 18, 1890.

Record, pp. 747 to 759.

Under this contract Mr. Cherry obtained the exclusive privilege to construct and operate a steam railway between the port of Buenaventura, on the Pacific Ocean, and Manizales, in the Republic of Colombia.

Id., p. 748, Art. 1.

Preferential rights to construct and operate other lines of railway were also granted.

The line between Buenaventura and Manizales was to be constructed and open to traffic, as far as the City of Cali, within four years, "except in case of fortuitous circumstances or *vis major*." After beginning the work it was to be continued without interruption, unless prevented by *vis major* or fortuitous circumstances, "and save and except the case of delays occasioned by the government and unavoidable by" Cherry.

Id., pp. 748–749, Arts. 2 and 4.

Upon that portion of the railway, to be completed within four years, as aforesaid, complainant guaranteed Cherry, interest, on the basis of 5 per cent. per annum, for 18 years, at the fixed sum of $38,000, American gold for each kilometre. This was to be paid annually upon such portion of the road as was completed at the end of each year.

Id., pp. 749–750, Art. 7.

A portion of this route had been built previous to the Cherry contract, viz.: between Buenaventura and Cordova. This, complainant assigned and transferred to Cherry, under this contract, together with rolling stock, buildings, etc. Upon this portion of the road the guaranteed 5 per cent. interest was to be paid on the basis of $8,000 per kilometre.

Id., p. 755, Art. 33.

Id., p. 750, Art. 8.

These payments of interest by the government, which were in the nature of a subsidy, were contingent. In order to fix the amount of such subsidy, it was expressly agreed that the total expense of administering, maintaining and "exploiting" the railroad should be $3,000 per kilometre, per annum, whatever the actual amount of such expense might be. If the gross receipts from operating the road should not exceed $3,000 per kilometre,

per annum, then the annual subsidy must be paid in full. But if such gross receipts for any one year exceeded $3,000 per kilometre, the government was bound to pay only the difference between such excess and the amount of the fixed subsidy.

Id., p. 752, Art. 18.

This guaranteed interest or subsidy was secured to Cherry by one-half the gross revenues of the Colombian custom houses on the Pacific coast, against which complainant was to issue drafts in Cherry's favor, payable at the National Bank of the Public Treasury, in January of each year. Deferred payments were to bear interest at 10 per cent.

Id., p. 750, Art. 10.

The term of the concession was fixed at 70 years, at the end of which the railway was to become the property of complainant.

Id., p. 752, Art. 17.

The exclusive right of way conceded was to be 80 kilometers wide. Cherry was also conceded the preferential right to all unappropriated lands, mines, or mineral deposits, within the right of way.

Id., pp. 753–754, Arts. 19, 22 and 23.

As security, Cherry agreed to deposit in New York, with complainant's depositary, $50,000 in American gold, before October 27, 1897. This was to be returned to Cherry when a portion of the road, equal in value to $200,000, was constructed. This $50,000 complainant could withdraw from its New York depositary, but must pay 5 per cent. per annum, semi-annually, on any portion so withdrawn.

Id., p. 754, Arts. 25 and 26.

Complainant agreed, without cost to Cherry, to furnish police

or military protection to employees and property. Cherry had the right to all wood, stone, or other materials upon government land, and necessary for railway construction. Also the right to construct ports, wharves, etc., upon government or railway lands, and to establish telephone and telegraph lines.

Id., p. 754, Art. 27.

Id., p. 755, Arts. 28 and 30.

Cherry had the right, after notice, to assign the contract to any individual, company, or corporation of a private nature. Cherry or his assignee might fix his domicile in any city in Europe or America, maintaining, however, an agent at Bogata, authorized to treat with complainant in reference to the contract.

Id., p. 756, Arts. 34 and 35.

Troops, employees, mail and materials of the Government were to be carried over the railway at one-half rates.

Id., p. 756, Art. 36.

In case of a forfeiture of the contract by complainant, any controversy was to be submitted to two arbitrators, one chosen by the Government, and one by Cherry or his assignee. These two were to choose an umpire, and the decision of the arbitrators, or of the umpire, was to be final and unappealable. By the contract, Cherry renounced diplomatic interference, except in case of a denial of justice.

Id., p. 756, Art. 37.

"For all legal effects" the enterprise was declared by the contract "to be a work of public utility," and Cherry and his assignee were to have "all the rights, and rights of action that the law concedes to enterprises of that kind."

Id., p. 748, Art. 3.

The $50,000 deposit was made by Cherry, as provided, and was thereafter appropriated by complainant to its own use.

Id., pp. 81, 124.

By virtue of two assignments or contracts, dated November 29, 1890, Cherry assigned his interest to the two defendants and was to receive in consideration therefor $135,000, payable either in bonds of the Cauca Company or in cash, and in any event his debt was to be paid in cash at the end of four years.

Id., pp. 44, 47.

Both defendants were West Virginia corporations, one, the Cauca Company, organized to own and operate, and the other, the Colombian Construction and Improvement Company, organized to construct the railway.

Id., pp. 37 to 49.

See also p. 793.

The complainant was duly notified of the assignment, and thereafter recognized and dealt with the defendant Cauca Company as such assignee.

Id., p. 657.

Thereafter, and within the four months limited in the Cherry contract, the defendant Cauca Company, through its agent, the defendant Colombian Construction and Improvement Company, began the construction of new road, and the repair of the old road, under said contract. It made preliminary and other surveys. It ordered and received from the United States and England large amounts of supplies, rails and materials for construction, locomotives, etc., necessary to construct and operate said railway. It continued its work of construction and operation, continuously and faithfully, under many and adverse circumstances, up to the alleged forfeiture of its concession, hereinafter referred to.

Id., pp. 81, *et seq.*

Id., pp. 125 to 129, 155, 162, 163, 179 to 195, 831 to 850, 763 to 774, 211 to 231, 832.

The difficulties of construction were of two general classes: (1) Those arising from the character of the country, and (2) those arising from the acts or defaults of complainant.

The road was near the equator. The portion to be first constructed and maintained, viz.: from Buenaventura, east, for a distance of nearly 40 miles, passed through an almost impassable tropical jungle. There were almost no inhabitants through this section, excepting upon the coast. The rainfall aggregated 360 inches in a year. The vegetation was so rank as to render the country almost fatal to foreigners. The floods swept away bridge after bridge. The largest and most important bridge on the road was carried away three times by the flood, before a permanent structure could be erected. All materials and supplies, even the simplest, had to be imported from England or the United States. Colombia produced nothing of that nature. Labor was almost impossible to procure, and was of the worst character. Laborers were imported as well as supplies. A field hospital was a necessary adjunct of the undertaking. The bones of the company's president, Mr. Cherry, and one of its engineers, are buried in this tropical jungle as a result of the enterprise.

See References, previous paragraph.

Also Record, pp. 175, 656–7.

On the other hand, while the work was in progress, a revolution in the politics of complainant occurred, and the animosity towards the company of a portion of complainant's inhabitants became intense, and made the conduct of the work almost impossible. Complainant failed to return to defendant the $50,000 deposited as security, or to pay interest thereon as agreed. After repeated negotiations and two years after it was due, the money was finally repaid in so-called libranzos, or custom house orders, at a great loss to defendants. Other pay-

ments due from complainant were deferred for long periods, and were finally paid in depreciated currency, or libranzos, instead of gold as agreed. Military protection, when requested was denied by complainant.

See References, previous paragraph.

Also Record, p. 1215, Ex. 80.

The result of these conditions was that the defendants were unable to complete the railway within the stipulated four years. Complainant's Executive and Minister of Public Works, however, anticipating this delay, and evidently recognizing the cause to be within the excuse for delay provided in the concession, in December, 1892, extended the time for two years more, within which the road was to be completed, thus giving defendants until October 18, 1896.

Record, p, 1216, Ex. 61, A. P.

Notwithstanding this equitable extension, complainant's Congress, on November 16, 1894, passed an act decreeing the concession of defendant Cauca Company lapsed, and authorized complainant to assume possession of the road and to continue its construction.

Id., p. 51.

The result of this unnecessary act of confiscation was to render it practically impossible to successfully continue the enterprise, although defendant continued in possession of the road, operating and maintaining it, and constructing new road as it had previously done.

Under the original concession, this act of forfeiture rendered possible a submission of the matter to arbitration. And defendants immediately protested to complainant and demanded (under Article 37, Concession) the formation of a tribunal of arbitration.

Again, in January, 1895, defendant Cauca Company, protesting against the forfeiture, offered to deposit a large sum to the order of complainant as a guaranty of defendants' good faith. The protest and offer were ignored.

Id., p. 1218, Ex. 80, A. P.

Again, on March 15, 1895, defendants' representative at Bogata requested complainant to take up the questions pending between it and defendants, and called for an arbitration under the concession.

Id., p. 1219, Ex. 85, A. P.

There seems also to have been another unanswered memorial of defendants, dated March 5, 1895.

It was not until March 26, 1895, after repeated memorials and requests on the part of defendants, that complainant replied. And then it simply stated that it did not intend to take possession of the road until an arbitration had been had.

Id., p. 1256, Ex. 11.

On April 18, 1895, defendants' representative at Bogata communicated to complainant his correspondence with Mr. Cherry, who was then at Buenaventura.

Id., p. 1219, Ex. 86, A. P.

The first was a letter dated April 1, 1895. In this letter Cherry protested against complainant's unsatisfactory note of March 26th, in so far as it failed to fix a time for the settlement of the controversy. He charged complainant with purposely evading settlement, without consideration of the rights of and damage accruing to defendants. He stated that he had sent repeated letters and telegrams to complainant, asking for a conference. He charged complainant with the responsibility of delay in construction. He charged that the suspending of payments since the forfeiture made it necessary for defendant to

incur oppressive obligations in excess of those provided in original concession. He also stated that he would hold complainant responsible, and would claim compensation:

(1) For amount invested in the enterprise.

(2) For interest due and to grow due.

(3) For loss of time, personal services, depreciation of materials and belongings, and any other injury and expense.

The second was a telegram of April 9, 1895. In this Mr. Cherry protested that the recent political disturbance of complainant was insufficient excuse for delay in considering defendants' complaint. (There was a revolution in Colombia in 1895.) He stated that the scope of the inquiry into the contention should not be limited to the legality of the act of forfeiture, but should also include the damages caused defendant by that act, as well as those accruing from complainant's failure to carry out its obligations under the concession. Mr. Cherry also suggested that this act was a denial of justice and entitled him to diplomatic interference.

The third was a telegram of April 16, 1895. He there stated, from information communicated to him, that he understood a considerable time would elapse before complainant would be ready to negotiate, and that if he received no further advice he would leave Buenaventura on April 20th for New York; adding, that he would always be ready to return without delay when complainant was ready to proceed with the negotiations.

The defendants' representative, Mallarino, in submitting this correspondence to complainant, said: "And would to God it were possible, despite the pressure of time, for your excellency to give me a reply that I could forward to Mr. Cherry before the 20th instant."

The only reply of complainant, dated April 20th, transmitted April 23rd, was that the collectors of customs had been ordered

to continue paying "the warrants issued in favor of the Cauca Railroad enterprise."

Id., p. 1257, Ex. 12.

Upon Mr. Cherry's return to the United States he interviewed Mr. Gresham, Secretary of State, at Washington, and as a result Mr. McKinney, the American minister at complainant's capital, was instructed in May, 1895, by the United States Government, that complainant's action in regard to the Cauca Company appeared to be a cause for diplomatic interference, and Mr. McKinney was directed so to inform complainant.

Id., pp. 255–256.

Thereafter, complainant and the defendant, Cauca Company's representative at Bogata, Mallarino, seem to have taken up an inquiry into the accounts of defendant, Cauca Company, as provided in Article 21 of the Concession. Complainant requested information, and was advised as to location of defendant's books, and they were placed at complainant's disposal, and certified copies of any accounts or documents required, were tendered.

Id., pp. 1222, *et seq.*; Exs. 91, 93, 94, 95, 96, 97, 99.

It was not until October 16, 1895, that complainant took any further definite action. It then instructed Cherry to appear at Bogata within 30 days, for arbitration, and in default defendant's rights would be forfeited. It was a physical impossibility for Mr. Cherry to go to Bogata in the time limited.

Thereupon Mr. Olney, then Secretary of State, wired Mr. McKinney that he deemed complainant's cancellation of defendants' concession improper, and instructed him to protect defendant in its negotiation with complainant, and to obtain an extension of 30 days for Mr. Cherry's appearance in Bogata.

This extension Mr. McKinney demanded of complainant and it was granted.

Id., p. 256.

In December, 1895, Mr. Cherry and Mr. Schramme, representing the Cauca Company, arrived in Bogata. Numerous negotiations between Messrs. McKinney, Cherry and Schramme and complainant's executive and other officers were had, and various propositions of settlement were made. It was represented, however, that no permanent settlement could be had until complainant's Congress could convene, and on January 26, 1896, a temporary settlement was made, whereby each party retained its rights under the original contract.

Id., pp. 256, 788.

Cherry and Schramme then returned to New York. Complainant's Congress convened in August, 1896, and Cherry and Schramme, the former with full powers to act for the defendant, Cauca Company, returned that month to Bogata.

Id., p. 257.

The American minister thereupon renewed negotiations of settlement. Soon after, complainant's Congress passed another Act, in reference to the previous forfeiture, in which certain terms of settlement were dictated. These terms being unsatisfactory, and Mr. McKinney and Mr. Cherry believing them to be a violation of the original concession, Cherry refused to negotiate further with complainant, and left the entire matter in the hands of the American minister.

Id., p. 257.

Frequent interviews took place thereafter between the American minister and complainant's Executive and its Minister of Foreign Affairs. Complainant's Executive, M. Caro, stated that he wished

to settle the matter amicably, without diplomatic difficulties, and requested the American minister to make a proposition. Accordingly propositions and counter propositions of settlement were thereupon made, none of which was then accepted.

Id., pp. 257, *et seq.*

The American minister made four alternative propositions in brief as follows:

1. To submit to a commission to determine, and complainant to pay, the exact amount of the expenses and obligations of the company incurred in the enterprise.

2. Complainant to pay defendant $600,000 in American gold.

There were two other propositions on the basis of a payment to defendant of $38,000 in gold per kilometer, under certain conditions, for the number of kilometers constructed.

Id., pp. 259–260.

The American minister's negotiations with President Caro were of the most friendly character, the latter being evidently desirous to reimburse defendant fully for its damages and loss. In discussing the various propositions he admitted to the American minister that the settlement of the claim for $600,000 would doubtless be more favorable for complainant, but that because of possible offence to the Colombian people he preferred to submit the matter to arbitration. At the some time he stated that he wished defendant to receive every dollar it had legitimately expended in the enterprise; he had no desire that the company should lose a dollar.

On the other hand the American minister advised both complainant and the company to accept the $600,000 proposition, because he believed it more favorable to complainant than an award would be, and because he believed Mr. Cherry could not

live long in Bogata, and the company's claim would be in a serious condition without him.

Id., p. 261.

On October 20, 1896, complainant's Congress passed Law 41, by which the Executive was "fully empowered to equitably compromise" with the defendant, Cauca Company, "the questions or differences that may rise in consequence of the declaration of lapse of the franchise," "*or by reason of the stipulations of the contract of August 27th, 1890, approved by Law 16 of the same year.*"

Id., pp. 53, *et seq.*

"In any event, the condition of the friendly settlement shall be the *renunciation*, on the part of the grantee or his representative, *of the franchise granted*," and the immediate delivery of the railroad and appurtenances.

In case a settlement could not be had, the act provided that the Executive should proceed to carry out the arbitration provided for in the original contract, and in case arbitration was not effective within 90 days, the Attorney-General was to institute judicial proceedings to "exact the fulfillment of the contract, together with indemnification for damages."

It was also provided that "The friendly agreement which the Executive may arrive at by virtue of the present decree, shall not require for its validity the subsequent approval of Congress."

Other provisions authorized the Executive "to determine the form and means whereby the necessary payments" might be made, and "the sums for said purpose" were to be "considered as included in the biennial budgets."

The Executive was further authorized to continue the construction of the railroad, if by any of the means provided "*the extinction of the franchise granted by Law 16, 1890, is secured.*"

Even after the passage of this act, and because of the animosity to the company of complainant's Minister of Hacienda, with whom negotiations were had, and because of his insistence upon settling with the company for the valuation of the road to be determined by expert engineers, the American minister refused to confer with him further, and demanded the arbitration provided for in the original concession.

This was followed by more delay and more negotiations, until finally the American minister insisted that the matter had become a diplomatic question. Within 24 hours thereafter, complainant's Executive sent for Mr. Schramme, and what was called the "Preliminary Basis of Settlement" was drawn and executed. This was on November 27, 1896.

Id., pp. 257–8.

In conformity with this basis, on January 4, 1897, complainant's Executive and its acting Secretary of the Treasury, and Mr. Cherry, representing the Cauca Company, executed and delivered the final agreement of submission, to a commission, of the differences between them.

This agreement recited that it was "in conformity with the basis of agreement stipulated on the 27th of November, 1896," and recited that it was executed by Mr. Cherry under one general and one special power of attorney, dated respectively December 31, 1890, and October 23, 1895. Both these powers of attorney were filed with and were in the possession of complainant, when the so-called basis of agreement was executed.

The special power of attorney of October 23, 1895, recited "that the original Cherry contract had been assigned to and was the present property of the defendant Cauca Company, subject to another certain contract with defendant the Colombian Con-

struction and Improvement Company," a copy of which is to be found in the archives of the company.

Id., pp. 1226, *et seq.*, Ex. 1.

In Article I of the Submission complainant and the Cauca Company "compromise and declare settled all pending differences" of "both parties in connection with the contract approved by Law 16 of the year 1890, regarding the construction" of the railway in question.

In Article II the company "surrenders absolutely the concession," and within fifteen days agrees to deliver to complainant the railway, with its fixed plant, rolling stock, etc. In exchange complainant agrees to pay the Cauca Company a "just indemnity for the works and labors which the company may have executed during the time in which the enterprise has been in its charge" and for rolling stock, etc.

In Article III the parties recognized in advance as the indemnity a sum equal to what "*the company* shall prove to have expended on the labors and works executed by it in the construction of the said railway," etc.

Article IV constituted a special commission to fix the indemnity, to be composed of three members, one to be chosen by complainant, one by the Cauca Company, and the third by the Secretary of State of the United States and complainant's minister at Washington, jointly.

Article V authorized this commission to fix the indemnity and to appraise the structures, works, labors and materials. To determine the indemnity, it was to examine the books and accounts of the company at New York, and the documents that complainant and the company might present in support of their respective claims, and such as the commission might demand. It was to inspect the railway, to make the necessary comparisons

and verifications, as a basis for fixing the indemnity, and might examine witnesses and appoint experts. It was to fix a reasonable period within which the parties might make their proofs. And it was its duty to "determine the procedure to be followed in the exercise of the powers conferred upon it both *as to its own acts*, as well as to the proceedings of the parties themselves."

Article VI provided that if any commissioner resigned, or declined, or for any reason ceased to act, "*the proceedings of the Commission shall not thereby be invalidated.*" The commission was to be restored by a new appointment, to be made within 30 days, by the party whose Commissioner failed to act. Upon failure to thus appoint, the Secretary of State of the United States and complainant's minister at Washington were to, jointly, fill the vacancy.

Article VII authorized the parties to appear before the Commission, in person, by attorneys in fact, or by agents.

Article VIII gave the Commission 150 days, counting from its first meeting, within which to make its award. They might extend this 60 days, in case of justifiable delay.

Article IX. The award was to be final and without appeal.

Article X. Herein, complainant calculating that the Company had invested in the railway about $200,000 (the Company asserting this to be much less than the just price), for the purpose of obtaining immediate delivery of the railway, complainant pays in advance to the Company $200,000 in gold, on account of the indemnity to be thereafter fixed by the Commission. In case of an award for more than $200,000, complainant agrees to pay the excess in manner and terms fixed by the commission.

Article XI provided for delivery of the railway to a person or representative to be designated by complainant, under a strict inventory which shall clearly set forth the condition of everything delivered.

Article XII provided that expenses of commission should be paid in advance by both parties, in equal shares. The commission to determine whether one or both parties are to pay the same.

Article XIII provided for a mutual release and discharge of the parties, upon performance by them of this agreement to arbitrate, and the extinguishment of the rights and obligations under the original concession.

Article XIV provided for selection by parties of their commissioners within 8 days after ratification of submission.

Article XV required commission to meet and organize in New York within 60 days after ratification of submission, with privilege of 30 days extension in case of justifiable delay.

Article XVI provided for ratification of submission by complainant's vice-president.

In pursuance of this submission, complainant appointed Manuel H. Peña, and the Cauca Company appointed Christian F. Schramme, as their respective commissioners, and the Secretary of State of the United States and complainant's minister at Washington appointed Professor Lewis M. Haupt, a civil engineer, of Philadelphia, as the third commissioner.

This commission assembled and organized in the City of New York, on April 3, 1897, and forthwith elected Professor Haupt chairman. The records of the commission indicate that the chairman was called "the umpire."

Id., p. 74.

Complainant was represented before the commission by Francisco J. Cisneros, as attorney, and Roderick Robertson, as counsel, and the Cauca Company, by Marcus Stine.

At the outset, a difference of opinion seems to have arisen as to the meaning and scope of the submission. The original was in Spanish.

Id., pp. 75 to 79.

During this discussion, complainant's representative admitted that complainant's action in its attempted confiscation of the railway was a wrong against the Cauca Company.

Id., p. 80.

Complainant contended, that the scope of the submission only permitted the commission to inquire into and determine the actual cost of physical construction of the railway in Colombia.

Whereas, the Cauca Company contended that it was to be indemnified and made whole for its entire legitimate expenses incurred in the enterprise.

The counsel for the Cauca Company at first refused to present his claim, until the scope of the submission was determined. But he finally consented to submit the claim "with the proviso that the commission, by a majority of votes, shall come to a conclusion as to what items can be considered."

It was then unanimously settled "*that all differences of opinion be settled by a majority vote, and that such decision shall be final.*"

Id., p. 80.

Again, at a later meeting it was unanimously determined that "*in case of disagreement between the members of the Commission*" as to all items in dispute, "*the Chairman shall decide the question at issue.*"

Id., p. 98.

At this time the chairman determined what appeared to him to be the meaning and intent of the submission. He stated that in his opinion it was intended by the submission that the Cauca Company "should be awarded a sum of money sufficient to compensate them for all legitimate and necessary expenses incurred in the prosecution of the work."

Id., p. 101.

Commissioner Schramme thereupon stated "that he would accept the above ruling on behalf of the Cauca Company."

Complainant's counsel asked for an adjournment so that Commissioner Pena might "have time to study the chairman's ruling," which was granted.

Id., p. 102.

At the next meeting of the Commission (June 1, 1897), the chairman invited the commission to discuss his previous ruling as to the scope of the convention, so that "if there still existed any misunderstanding, he would be glad to hear from both sides on the subject, *as it was time the commission should reach a definite conclusion on this fundamental matter.*"

Id., p. 103.

Thereupon a full argument was had as to the meaning of the submission, on the part of complainant by its Commissioner Pena, and its counsel Cisneros and Robertson, and on the part of the Company, by its Commissioner Schramme, and its counsel Stine. At the conclusion of the arguments, the chairman practically affirmed his previous decision.

Id., pp. 110, 111.

Mr. Robertson then put the following questions:

"Do I understand it to be the scope of this decision that the Commission feels itself entitled to take the accounts of the Cauca Company and ascertain and allow for all sums which it legitimately expended in the enterprise, whether laid out on engineer's work, construction, work, equipment or with relevancy to the enterprise broadly considered?

"The Chairman: My view is not to limit our investigation to the mere expenses of the work, but to take into consideration all expenses of the company that show both sides of the account,

receipts as well as expenses, in order that we may determine what are legitimate and necessary for this work."

Id., pp. 111, 112, 205, 206.

Complainant's counsel then asked for an adjournment to enable him to communicate with complainant's government, before proceeding further.

The chairman then stated that he had "listened with interest to your arguments and" he saw "nothing therein to induce" him to modify his opinion.

Id., p. 112.

Upon the point of complainant's counsel consulting with their principal, the chairman said: "The chair does not rule that you should not consult with your principals; it does rule that, whatever your principals may advise would not affect the commission, since it cannot change the mutual assent already fully and finally given to the convention."

Id., p. 114.

Mr. Robertson then asked:

"Is the chairman willing to place on the record that the representative for the government accepts without prejudice the opinion of the chairman, and he retains the right to withdraw from the commission after receiving instructions from the government?

"The Chairman: Yes."

An adjournment was finally granted *without stating "officially on the records the purpose for which the adjournment is asked."*

Id., p. 115.

It would appear that the adjournment was had, so that complainant's counsel and commissioner might communicate to complainant's government the interpretation put upon the sub-

mission, without making the official record show the purpose of the postponement.

Id., p. 199.

In the meantime the examination of the Cauca Company witnesses was to go on. This was on June 1, 1897.

Id., p. 115.

On the next day, however, eight days were expressly granted complainant's commissioner within which to consider the chairman's opinion, so that the commissioners might be unanimous if possible.

Id., p. 116.

On June 10, 1897, Pena filed his dissent in writing from the ruling of Haupt and Schramme as to the meaning of the scope of the submission.

Id., pp. 144 to 147.

During the next sessions, and up to and including the eighth (June 19th), the commission heard testimony as to the company's claim.

During the course of this testimony, complainant, apparently abandoned its contention, that the cost of construction was the sole question to be determined by the commission. It introduced (upon cross-examination) a mass of testimony as to the amount of cash received by company from the government, from traffic receipts, etc. Also disbursements for operating expenses, etc. Also amount of cash sent to company's officers in New York. The evident purpose being to show that the company had received more in the way of receipts from the government guaranty, and operation, than it had expended in operation and construction.

Id., pp. 135 to 140, 169 to 173, 175 to 181, 186 to 189.

At the ninth session of the commission, on June 19, 1897, complainant's counsel and representatives again returned to the question as to the scope of the submission.

At this time they offered to the commissioners the written opinion of another counsel, not connected with the case, which opinion indicated that the commissioners had erred in a number of particulars during the course of their proceedings.

One of the questions submitted by complainant's representative to this outside counsel was, as to the advisability of complainant's proceeding further with the arbitration, in view of the opinion of the majority of the commission, as to the scope of the submission.

Id., p. 198.

That counsel had advised "that there was only one honorable course" for complainant "to pursue, and that was to retire from this arbitration."

Id., p. 199.

Complainant's counsel, Mr. Robertson, also advised complainant to withdraw. He seems to have clearly stated the position and liability of complainant provided it did not then withdraw. On June 24th he said:

"It would not be right for us to go on with the trial of this matter in a way which may lead to a wholly unauthorized result. *If we continue now, the consequence would be that Colombia would be in honor bound to pay every penny that might be awarded to the Cauca Company by the commission, whether authorized by the convention or not.*"

Id., pp. 198, 204.

At this meeting the Cauca Company's counsel called upon complainant's representatives to act definitely in reference to their threatened withdrawal, while there was yet time to restore the commission by a new appointment. He said in part:

"We are prepared to finish our case. We call upon the other side to put in a rebuttal, and if they fail to do so, I beg, Mr. Chairman, to ask that this meeting be suspended to give the representative of Colombia an opportunity of withdrawing."

Id., pp. 199 to 202, 204 to 205, 207.

Complainant at this meeting requested an adjournment for two months, within which to communicate with the government, as to the advisability of withdrawal. This was voted upon and refused.

Id., pp. 202 to 204.

It must have been made clear to complainant at this time that the commissioner's ruling as to the scope of the convention was final. Upon the point of withdrawal of Pena and substitution of another commissioner, the chairman said:

"It would merely shift the responsibility from one set of individuals to another, and would not be retroactive, *for the ruling of the chair*, however, *cannot be altered.*"

Id., p. 206.

Complainant was finally granted an adjournment of three weeks against the protest of the Cauca Company, within which to communicate with the Bogata government, although the reason for adjournment was not expressly put upon that ground.

Id., p. 207.

During the adjournment, Cisneros, complainant's representative and attorney, sent the following peculiar cablegram to complainant's Minister of the Interior:

"NEW YORK, *July 1st*, 1897.

Commission *has decided* against opinion of Pena, that Convention 4th January authorizes other expenses abroad besides those of local construction. Schramme sustains that this was agreed to with Government. *Renowned counsel advise Pena to*

resign and I to retire the Government, should commission insist on considering all the losses of the company. Please send precise instructions, and in case of instructing our withdrawal, *it will be necessary that Minister at Washington should not accept substitute. This would give rise to the formation of a new Convention.*"

Id., p. 1180.

The faithlessness of this suggestion seems to have been understood by Señor Rengifo, complainant's minister at Washington, D. C., as upon the following day he cabled complainant's President as follows:

July 2, 1897.

"I know Cisneros' cable to Minister Hacienda relating Cauca Railroad Commission matter. Government should think whether it can sustain grave situation which withdrawal from proceedings creates and *then evading compliance Article* 6, *Convention, January* 4. I beg you will pardon patriotic intrusion."

Id., p. 1244.

Complainant's Minister of the Interior answered Cisneros' cable as follows:

"BOGATA, *5th July,* 1897.

"If commission condemns government to pay losses of the company or other things over and above construction expenses, government will not accept decision, inasmuch as it would be openly violating the perfectly clear convention of 4th January. Please inform Cisneros in order that he may notify commission."

Id., pp. 1091, 1250.

It seems that about this time Cisneros advised Pena that he was going to withdraw from the arbitration, and frequently importuned Pena to do the same. Pena "always answered" that he "could take that step" *when he "considered it convenient."*

Id., pp. 1176-7-9.

Pena was perfectly cognizant of the sending of the Cisneros cablegram of July 1st and knew its contents. It was sent after a conference between Cisneros and Pena in reference to its contents. Pena says he did not "dissent or consent."

Id., pp. 1180, 1182, 1183.

Shortly before, or at the time of the Cisneros cable of July 1st, Pena also sent what he terms a "private letter" to the Minister of the Interior, saying "that it was very likely" he "should resign," and asking private advice from the government as to whether it should be "*convenient*" for him to withdraw. To this letter, he asserts, he received no reply.

Id., p. 1181.

The tenth session was held on July 21st, 1897. In the interim between the ninth and tenth sessions, the books of the company were submitted to the examination and analysis of an expert, under the supervision of the commissioners. The elaborate written report of this expert had been, previous to this session, submitted to both sides for their examination. This session was devoted to a cross-examination of the expert in reference to his report.

Id., pp. 208 to 232.

Report—Id., pp. 808 to 830.

The eleventh session, held July 22d, was devoted to the testimony of Mr. Schramme.

Id., pp. 232 to 254.

This testimony was afterwards excluded by consent of commissioners, together with some improper testimony introduced by complainant, and was not considered by commissioners in making their award.

Id., pp. 637, 1273.

The twelfth session, held July 26th, was devoted to the testimony of Mr. L. F. McKinney, formerly American Minister to Colombia, testimony taken in behalf of the company. This closed claimant's case.

Id., pp. 255 to 278.

At the thirteenth session, held July 27th, the government proceeded to put in its case in rebuttal. One M. P. Carter, formerly a civil engineer of the Cauca Company, was the first witness. His testimony was for the purpose of showing imperfect construction, rebutting the company's charges for construction, repairs, etc. Carter's direct and cross-examination continued to and included the twenty-first session, held August 17th.

Id., pp. 279 to 476.

Complainant attempted also to prove by Carter the meaning of the disputed words in the convention, with reference to the scope of matters submitted to commissioners.

Id., pp. 414 to 421.

During the nineteenth session, August 12th, a portion of the session was given to the examination of Fremont Wilson, a civil engineer, called by claimant to rebut the testimony of Mr. Carter.

Id., pp. 429 to 446.

During a portion of the twenty-first and twenty-second sessions, one J. B. Dougherty, a civil engineer, was examined in behalf of the government. His testimony was also as to the meaning of the convention.

Id., pp. 475 to 484.

During the twenty-second session, Mr. Cisneros, the government's representative and attorney, was produced by complainant, to interpret the meaning of the convention.

Id., pp. 486 to 494.

The government also adduced Cisneros' testimony to show the value of claimant's concession.

Id., pp. 506 to 509.

The sessions from the twenty-third (August 19th) to the twenty-seventh (August 30th), inclusive, were devoted to testimony, chiefly adduced by the government, to prove the meaning and scope of the agreement of submission.

Id., pp. 509 to 614.

The witnesses were expert Spanish lawyers, engineers and literary men, and they differed widely and fundamentally as to their interpretation of the convention. Some of them testified that the indemnity to be made included "*every legitimate expense made in the enterprise*" by the company. (Id., p. 566.) Others, that even officers' salaries could not be awarded.[1]

Id., p. 581.

At the twenty-seventh session (August 30th) the commission finding it could not complete its work within the first limit of 150 days, unanimously resolved to extend time 60 days.

Id., p. 602.

At the twenty-eighth session (August 31st) for the purpose of avoiding the necessity of the commissioners going to Colombia to make a personal inspection of the railway, a stipulation was entered into as to the cost of the *physical* construction of the road. For this purpose the figures of the government's witnesses, viz.: $233,909.14 were accepted by both parties as accurate.

Id., pp. 614, 615.

It was, however, expressly stated that this would eliminate from the consideration of the commission only the cost of *physical*

[1] See Appendix to brief, for differences of opinion among expert witnesses.

construction, and as complainant's counsel then stated it would remain for the commission "*to ascertain whether the Governmen had included what, within the terms of the convention, should properly be allowed as construction.*"

Id., p. 615.

The "stipulation was also without prejudice to any claim or defense of either party relative to any matter not specifically mentioned" therein.

Id., p. 616.

It seems very clear from these proceedings that both parties thereby submitted to the commissioners the determination of the meaning of the word "construction," as it appeared in the convention.

Id., p. 615.

At the twenty-ninth session (September 10th), the government's representatives were asked by the commission what reply complainant had made in reference to the stipulations entered into at the last session, and they produced the following cablegram:

"PENA-CISNEROS, *New York.*

"If you judge unnecessary inspection Buenaventura, do not do it.

"ESQUERRA,

"*Minister of Hacienda.*"

Id., p. 619.

During this session Mr. Schramme was again called by the company as a witness in its behalf. This testimony was in rebuttal of complainant's case.

Id., pp. 620 to 626, 630–631, and 634 to 636.

During this session, the sworn opinion of Mr. Ponce de Leon, as to the scope of the submission, was offered by the company and

accepted by complainant, as of the same effect as if the witness had personally appeared and been sworn.

Id., pp. 627 to 630.

At this session Mr. Robertson offered in evidence a cablegram, dated September 6th, from complainant's President, rebutting portions of Mr. Schramme's testimony. This was read to the commission, but was not admitted as evidence, on the ground that the cable to which it was a reply was not also offered.

Id., pp. 632 to 633.

It was afterwards agreed that if complainant introduced the cable to which the cable of September 6th was a reply, both would be admitted as evidence.

Id., p. 636.

Two other cables, one to (September 11th) and one from (September 18th) complainant's President, are printed in the record. But they were never accepted as evidence.

Id., pp. 641–2.

This closed the testimony. On October 7th, the commission declared "that under the circumstances, and for the purpose of its decision, neither Mr. Schramme's testimony nor the despatches of the President of Colombia shall be considered as being before it."

Id., p. 637.

The thirtieth session, held October 12th, was the first session of the commission held to consider and decide upon the testimony before it. In the meantime the commission had received elaborate briefs from both parties.

At the outset Mr. Pena, complainant's commissioner, asked permission to introduce an expert Colombian lawyer to prove the illegality of the extension of the company's concession in

1892. This, he argued, was pertinent, "inasmuch as we are going to fix certain items of the claim, *and we are specially to consider the transfer of the concession, that certainly may be affected if the extension is not valid.*" "Because, if the concession was ended in four years, at the end of 1894, there was no concession at all, legally speaking. *Hence, if we are going to estimate what the concession was worth at the 4th January,* 1897, as it did not exist at the time the convention was made, it could have very little value."

Id., p. 643.

It would seem, therefore, that complainant's commissioner, notwithstanding the previous claim that the commission was limited to the allowance of local and physical cost of construction, contemplated at this time, the consideration of the value of the concession. The testimony was not permitted.

During this session the chairman introduced an elaborate draft of a report, which he offered as a basis for the final award.

Id., pp. 645 to 664.

In this draft, at the outset, he rejected the idea that it was the duty of the commission to determine which party was in default, or to treat the question as an adjudication of damages, but solely to ascertain what the company had expended "in carrying on the operations of constructing" the railway.

Id., p. 645.

He then analyzed the scope of the convention, seeking his interpretation in (1) the preliminary conferences, papers and documents which resulted in the convention, and (2) in the testimony of the various experts as to its meaning.

He stated his conclusion upon this point as follows:

"It is manifest, therefore, that there is a substantial agreement amongst most of the witnesses on both sides as to the scope of

this convention, which they construe to include all legitimate expenses incurred in the construction of this road, using the term construction in its broad sense.

"It only remains to determine what it has actually cost the company to produce this result which, with the concession, has been surrendered to the Government of Colombia."

Id., p. 654.

He then analyzed the items of the company's claim and stated what should and should not be allowed.

Id., pp. 655 to 661.

During this session Commissioner Pena insisted that the basis of convention was binding, and since it provided the method of paying the award, it should be followed by the commission.

Id., p. 664.

The chairman suggested that the commission first take up and determine the scope of the submission, and called for its discussion, as it was the key of the whole proceeding.

Id., p. 665.

Mr. Pena's reply to this invitation was: "*At present I cannot say what view I may take.* The Convention speaks of moneys spent. Any interest due by the company cannot be called money spent."

Id., p. 666.

It is important to bear this statement of Mr. Pena's position in mind in connection with his Boston testimony.

At the thirty-first session (October 14th) nothing was done, Commissioners Pena and Schramme not being prepared to vote upon or discuss the chairman's report.

Id., p. 670.

At the thirty-second session (October 15th) the following resolution was passed:

"It is resolved that the minutes of the meetings of the commission shall form part of the printed record."

Id., p. 671.

It was moved by Commissioner Schramme "that this commission adopts as the scope, meaning and intent of the convention the exhaustive opinion given by the chairman in his tentative report."

Id., p. 672.

The chairman then stated that the portion of his report to which the motion referred "intended to include all legitimate expenses incurred in the construction of the road, using the term 'construction' in its broad sense."

Id., p. 672.

Mr. Pena then read a long and carefully prepared argument in opposition to the previous report of the chairman.

Id., pp. 672 to 689.

Then followed a discussion of Pena's argument and the chairman's report, during the course of which Pena seems to have admitted the ambiguity of the convention. He said:

"For the very reason that construction refers only to the construction of the '*Obras* and *trabajos*' of the railway, and that both sides were unable to agree, experts were called in to interpret the meaning thereof, otherwise it would have been unnecessary. If the specific words 'physical construction' had actually been used in the convention, no discussion would ever have occurred on the subject."

Id., p. 695.

At the close of this argument the chairman put the resolution of Mr. Schramme as to the scope of the convention as follows:

"*The Chairman:* What is your vote, Mr. Pena?

"*Mr. Pena:* Negative.

"*The Chairman:* What is your vote, Mr. Schramme?

"*Mr. Schramme:* Aye.

"*The Chairman:* The chairman regrets that he cannot agree with both parties at issue, and records his vote in favor of the resolution. The motion is, therefore, declared carried."

Id., p. 703.

At the thirty-third session (October 18th) the commission allowed to the company the item of $233,909.14, as per stipulation of August 31st.

Id., p. 704.

Commissioner Schramme then moved that the sum of $108,-181.42, being the salaries of executive officers up to January 26, 1897, be awarded to the company.

Id., p. 706.

After considerable discussion the motion was put and carried by a vote of 2 to 1.

Id., p. 711.

The commissioners next took up the allowance of the cost of concession and interest thereon. At the request of Mr. Pena, the consideration of the interest was separated from that of the price of concession.

Id., p. 711.

Upon motion, and by a vote of 2 to 1, the company was awarded $135,000, being the cost to it of the original concession.

Id., pp. 713–4.

Upon motion, and after discussion, by a like vote, the company was awarded the sum of $13,643.33 for interest on the cost of concesssion.

Id., p. 714.

Upon motion, and after discussion, and by a like vote, the company was awarded $29,385.88 as traveling expenses of its officers.

At the Thirty-fourth session (October 19th) Mr. Schramme moved to award the company $48,668.18 as interest to January 26, 1897, on the stipulated cost of physical construction in Colombia. After considerable discussion the chairman requested that the vote upon this item be postponed, so that he might give the same fuller deliberation, which was done.

Id., pp. 716 to 718.

Upon motion, and after considerable discussion, the sum of $29,200 was awarded the company, by a vote of 2 to 1. This was to reimburse the company for a portion of the extra compensation paid its officers for two trips to Bogata.

Id., pp. 719 to 725.

It is pertinent to recall that it was during the last of these trips that Mr. Cherry lost his life in Colombia.

Id., p. 708.

At this session it was determined that the minutes of the sessions 1 to 29, at which testimony was taken, should form Volumes I and II of the printed record, and that Volume III should contain the documents, exhibits and deliberations of the commissioners.

Id., p. 725.

Mr. Schramme moved to award the company $32,333.40 as interest on actual amount paid in by bondholders. Mr. Pena

asked for the postponement of this item. The chairman consented to postpone action on the item, but expressly stated that he dissented from Mr. Pena's objections to the item, and considered it a "distinct and well-recognized liability" of the company.

Id., pp. 726 to 727.

Upon motion, and after full discussion, by a vote of 2 to 1, the company was awarded $16,605.10, being expenses of New York office.

Id., pp. 729 to 731.

The sum of $5,122.48 for incidental expenses was likewise awarded the company by a vote of 2 to 1.

A summary of the items thus allowed up to and including the 34th session is as follows:

Cost of physical construction in Colombia	$233,909.14
Salaries of executive officers	108,181.42
Cost of concession	135,000.00
Interest on same	13,643.33
Traveling expenses	29,385.88
Extra compensation	29,200.00
Expenses New York office	16,605.10
Incidental expenses	5,122.48
	$571,047.35

Mr. Pena, the government's commissioner, was present at all of the sessions, listened to all of the testimony, heard all of the arguments, and participated in all of the deliberations from the first session on April 3, 1897, to and including the 34th session on October 19th, 1897. He also signed all the minutes of those sessions.

At the Thirty-fifth session (October 22, 1897), held pursuant to adjournment, Mr. Pena failed to appear.

In lieu thereof the remaining commissioners were presented with a translation of a letter addressed by him to complainant's Minister of Hacienda, at Bogata, in which he recites that his co-commissioners had declared their intention to allow unauthorized sums against complainant, and he conceived it to be his duty to withdraw from the commission before "the alleged intentions of said commissioners shall have been carried out by the making, on their part, of a pretended award;" he therefore resigns from the commission, his resignation to take effect "at the moment of my signature hereto."

This communication was dated October 22, 1897.

Accompanying this letter was also one from complainant's representative and attorney, Cisneros, of the same date, addressed to Prof. Haupt and Mr. Schramme. After reciting Pena's alleged resignation, he says: "I desire, on behalf of the said Republic of Colombia, to say that such resignation on the part of Mr. Pena *has destroyed the autonomy of the commission,* * * * and that, under such circumstances, no further act on your part can have any force or effect as an official act on behalf of such commission, or as an official act of a commission in said matter."

Id., pp. 732 to 733.

It is pertinent to recall that the commission had sat through 203 days at this time, and had but 7 days more within which, under the submission, to complete their award.

The receipt of these communications surprised and demoralized the remaining commissioners. (Id., p. 1277.) At first Professor Haupt began the dictation of a letter to the Secretary of State, but as the dictation proceeded it occurred to him to be an unnecessary proceeding.

Id., p. 1269.

The substance of this dictation, as far as it proceeded, is testified to by the secretary to be as follows:

"It was addressed to Mr. Sherman, and stated that, in view of the fact of the arbitration commission having held deliberations at which all members of the commission were present, and that having about arrived at a decision, one of the members, the member appointed by the Colombian Government, had resigned, and they wished to have the instructions of the government in regard to it."

Id., p. 1164.

In the meantime Mr. Schramme stated that he wished to advise with the company's counsel, and Prof. Haupt accorded him the privilege. Mr. Stine subsequently appeared, and being informed of the proposed communication to Secretary Sherman, coincided with the chairman's conclusion that it was unwise to send it.

Id., p. 1270.

Upon Stine's arrival the commission took a recess. The chairman thereupon, in view of the delicacy of the situation and of the fact that Mr. Miller, the secretary, was also the private secretary of Cisneros, and wishing to grant Mr. Schramme an opportunity to confer with his counsel privately, which conference was foreign to the proceedings of the commission, requested Mr. Miller to withdraw from the room. Upon Miller's return, he was requested to destroy the notes of the incomplete letter to Secretary Sherman.

Id., pp. 1270, 1274.

Thereafter it was determined to adjourn the session until afternoon, so as to give Pena and Cisneros an opportunity to attend. The chairman then notified Pena of the adjuurnment and requested him to attend the adjourned meeting. Pena refused, stating that he did not consider himself a member of the commission. The chairman notified him that they would proceed without him.

Id., p. 1270.

The remaining commissioners then consulted Mr. Louis Marshall,

of the New York bar, who assisted them in the preparation of the award.

Id., pp. 1271–2.

At the afternoon session (Pena being absent) a resolution was adopted that the remaining commissioners proceed forthwith to formulate their award. This resolution recited, among other things, that *all* the commissioners had deliberated upon all matters submitted to it, and that the commission had reached a conclusion *prior* to October 22d, but that such conclusion had not yet been formally announced. That Pena's attempted resignation and refusal to act at this time, and Cisneros' concurrence therein, indicated the impracticability of obtaining a substitute for Pena within the time limited to make an award. And that the commissioners, having authority under the submission, to determine their procedure as to their own acts, had previously determined unanimously, and with the concurrence of Cisneros, that all their decisions and differences of opinion should be settled, finally, by a majority vote.

Id., pp. 741–2.

Thereupon Commissioners Haupt and Schramme executed in quadruplicate an award against complainant and in favor of the Cauca Company for $652,048.93, (or $452,048.93, after deducting the $200,000 previously paid), payable in gold at New York City, on January 26th, 1898.

This award also allowed as costs against complainant an attorney fee of $10,000, payable in like manner as the award.

Id., pp. 742 to 746.

Thereupon the commission adjourned.

It appears that after the 34th session Pena went to Washington to advise complainant's minister that he had decided to resign. His reason therefor was because he "did not concur with the views of the other members of the commission."

Id., pp. 1176–7, 1179.

He also states that at this time Cisneros again advised him to withdraw. Previously to this Pena had refused Cisneros' advice to withdraw, stating that he could take that step whenever he "*considered it convenient.*"

Id., p. 1177.

On October 22nd Pena also cabled complainant's government practically what he had written in his letter of resignation of the same date. Pena received no direct answer to this cable, but complainant's government shortly afterwards cabled Cisneros that they approved the "steps that you have taken."

Id., p. 1185.

Thereafter complainant not only made no offer to restore the commission, but apparently ratified and approved the effort of its commissioner and representative to disrupt the commission and to nullify the result of its long and arduous labors.

The learned trial judge, after giving "the testimony careful study," in his opinion and decree, found :

1. That the award was not invalid for the reason that it was signed by two only of the three commissioners.

Id., pp. 1294 to 1297.

2. That the submission of January 4, 1897, was ambiguous for the reason that it was in a foreign tongue, and that certain words used therein had a technical meaning.

Id., pp. 1298–9.

3. That the meaning of this submission, and the items intended to be included therein, was a question "for the Commission to decide."

Id., pp. 1298–9.

4. That the Commission had properly allowed to defendant the following items, and as to those items the award was "approved, ratified and confirmed as and for a valid and binding award," with interest from January 26, 1898, viz.:

Cost of physical contruction...	$233,909.14
Salaries of officers	108,181.42
Cost of concession	135,000.00
Traveling expenses	29,385.88
Extra compensation to officers	29,200.00
Expenses New York office	13,605.10
Incidental expenses	5,122.48
	$557,404.02
Less payment made	$200,000.00
	$357,404.02

Id., pp. 1298 to 1300, 1304.

5. That the Commission erred in awarding the following items, and the same were disallowed, viz.:

Interest on cost of concession	$13,643.33
Interest on cost of physical construction	48,668.18
Interest on actual amount paid by bondholders	32,333.40
	$94,644.91

Id., pp. 1300–1, 1304.

6. That there was no direct authority given in the submission for the allowance of interest, nor was it to be inferred from the facts and circumstances attending the negotiations that the defendant was in the actual possession of the railway "enjoying such revenues as it yielded and at the same time receiving from complainant an allowance in the nature of a subsidy." That it was not the intent that the defendant "should be allowed both the use of the property and interest in the fund used in constructing it."

Id., pp. 1300–1.

7. That the Commission erred in the special allowance of $10,000 to defendant's counsel as costs incident to the commission, and the same was disallowed.

Id., pp. 1301–2, 1304.

SYNOPSIS.

I.

PENA'S WITHDRAWAL DID NOT INVALIDATE THE AWARD (pp. 45–68).

(A) THE MAJORITY HAD POWER TO AWARD (pp. 45–56).

(1) Because it was a public matter (pp. 46–50).

(2) Because the Commission unanimously so decided (p. 50).

(3) Because such was the intention of the parties (pp. 51–56).

(B) THIS POWER WAS NOT AFFECTED BY PENA'S WITHDRAWAL (pp. 56–68).

ON LEGAL GROUNDS:

(1) Because the mere writing of his letter of resignation did not create a vacancy (p. 58).

(2) Because it came at a time when his membership in the Commission had ceased to be material (pp. 59–63).

ON EQUITABLE GROUNDS:

(1) Because it was for the fraudulent purpose of defeating the award (pp. 63–66).

(2) Because it would divest the company of all its rights (pp. 66–68).

II.

THE PORTION OF THE AWARD CONFIRMED BY THE COURT BELOW IS NOT OBJECTIONABLE AS BEING A DEPARTURE FROM THE SCOPE OF THE SUBMISSION (pp. 68–85).

(A) THE SUBMISSION WAS AMBIGUOUS, AND ITS SCOPE WAS THEREFORE A QUESTION FOR THE COMMISSION TO DETERMINE (pp. 68–69).

(B) THE COMMISSION CORRECTLY CONSTRUED THE SUBMISSION FROM THE EVIDENCE BEFORE IT, AS FOLLOWS:

(1) The circumstances existing at the time the agreement was made (pp. 70–74).

(2) The interpretations by Spanish scholars (pp. 74–79).

(C) IN DECIDING WHETHER OR NOT THE COMMISSION ERRED IN ITS CONSTRUCTION, THE COURT MUST CONSIDER THE EVIDENCE BEFORE THAT TRIBUNAL (pp. 79–80).

(D) THE EVIDENCE IN THIS CAUSE, BEARING ON THE SCOPE OF THE SUBMISSION, DOES NOT CLEARLY SHOW THAT THE COMMISSION ERRED IN ITS CONSTRUCTION THEREOF (pp. 80–85).

III.

THE FACT THAT THE ITEMS OF THE AWARD WERE ASCERTAINED BY REFERENCE TO DISBURSEMENTS MADE BY THE COLOMBIAN CONSTRUCTION AND IMPROVEMENT COMPANY DOES NOT INVALIDATE THE AWARD (pp. 85–89).

IV.

THERE WAS NO FRAUD OR MISCONDUCT ON THE PART OF COMMISSIONERS HAUPT AND SCHRAMME (pp. 89–91).

V.

THE APPELLANT IS ESTOPPED FROM ASSERTING THAT THE AWARD WAS INVALID (pp. 91–95.)

ARGUMENT.

I.

PENA'S WITHDRAWAL DID NOT INVALIDATE THE AWARD.

Appellant's contention that because of this act of Pena the award signed by the majority could have no validity, seems to be based upon two grounds, viz:

1. That the unanimous vote of the three members of the commission was requisite to the validity of an award.

2. That even if a majority had power to award, the withdrawal of Pena destroyed the autonomy of the commission and deprived them of this power.

Although the earnestness with which this first reason was urged by Appellant's Counsel in the Court of first instance seems to have abated in the Appellate Court, still as it has apparently not been abandoned, we feel obliged to reiterate our views on this point in the present brief.

Power of Majority to Award.

We, therefore, assert that the majority had power to decide on all matters submitted and to make the final award, for the following reasons:

1. The submission was in the nature of a public contention; and in controversies of this character, the act of the majority is the judgment of the whole number appointed.

2. In the exercise of a power conferred upon it by the Convention, the Commission unanimously decided, at the outset, that the vote of a majority should be the act of the Commission in all matters.

3. It was the intention of the parties at the time the Convention was made that an award made by a majority should be valid and binding.

1. Where matter of a purely private nature has been submitted to arbitration it is essential to the validity of the award that it must be concurred in by all of the arbitrators; unless the intention of the parties appears to the contrary.

Mr. Justice Thompson in *Hobson vs. McArthur*, 16 Peters, 182.

But, as was said by Thompson, J., in *Green vs. Miller*, 6 Johnson, 39 (1810):

> "In matters of public concern a different rule seems to prevail; there the voice of the majority shall govern."

See also *Eames vs. Eames*, 41 N. H., 177, and *People vs. Walker*, 23 Barb., 304, in which the following is quoted from *Gridley vs. Barker*, 1 Bos. & P., 236:

> "But it is equally well established that where a number of persons are entrusted with a power, not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole."

And this distinction has clearly been made from the beginning.

Coke's Litt., 181a.
Gridley vs. Barker, 1 Bos. & P., 236.
Rex vs. Beeston, 2 P. R., 594, 3 Dur. & E., 592.
McCoy vs. Curtice, 9 Wend., 17.
Ex parte Rogers, 7 Cow., 526.
People vs. Nichols, 52 N. Y., 278.
Cooley vs. O'Connor, 79 U. S., 391–398.

Patterson vs. Leavitt, 4 Conn., 50.
Young vs. Buckingham, 5 Ohio, 485.
Bank vs. Mt. Tabor, 52 Vt., 87.
Soens vs. Ravine, 10 Wis., 271.
Commonwealth vs. Canal Commissioners, 9 Watts, 466–470.
Williams vs. School District, 21 Pick., 75–82.

The reason for the distinction is put upon various grounds.

By Coke, that in case of a public matter, it is "*pro bono publico*," and, therefore, shall be more favorably expounded than when it is only for private.

In *Gridley vs. Barker*, *supra*, on the ground of convenience, and because one obstinate man might defeat the entire purpose of the act.

In *Patterson vs. Leavitt*, 4 Conn., 50, because, in matters of public concern, the arbiters "derive their power to administer justice by the *act of law*."

In *People vs. Nichols*, *supra*, it is held:

> "But where appraisers act between individuals and the State, it is a matter of 'public concern,' and a majority act as the whole, when all have met."

Bank vs. Mt. Tabor, *supra*, a well considered case containing a review of the leading cases, holds that a majority of three commissioners, authorized to subscribe for railroad stock in behalf of a township, might act; not for the reason that they were strictly public officers, but partly because their duties were to "obtain for the town better railroad facilities," and because "a railroad is a public work and interest."

The doctrine established by the above cases and the reasons given in support thereof, are clearly applicable to the case at bar. The Congress of Colombia, by Law 41, of 1896, "fully empowered" "the Executive" to "equitably compromise" "the questions or differences that may arise" between the Colombian government

and the Cauca railway, by reason of a *previous act of that Congress* forfeiting the railway franchise and practically confiscating all its property and rights. By virtue of this *Public Act*, the Executive entered into an agreement with the railway for, in behalf and in the name of the government, whereby the railway was surrendered to the Government, and in consideration therefor, the Company was to be paid $200,000 and such further sum as should be awarded by a Commission therein provided for. This Commission was to be appointed, one by the Secretary of Treasury of Colombia, another by the Cauca Company, and the third by the United States Secretary of State, and the Colombian minister at Washington. The Commissioners were duly appointed as aforesaid, excepting that the Colombian government impliedly reserved and expressly exercised the right to approve of the Commissioner appointed by the Company. (See appointment of Schramme, Record, p. 65, Exhibit 14). This agreement was "under authority of said law" (Complainants' Bill, Sec. 12, Record, p. 67) and the Commissioners therefore derived their power to act through and by virtue of this law.

Anteceding all these proceedings, however, the original Cherry contract seems to have conclusively fixed the public character of all subsequent contentions in reference to the railway.

Art. 3 of that contract provides:

> "For all legal effects the construction of the railway to which the preceding articles relate *is declared to be a work of public utility;* and, therefore, the concessionary shall have all the rights and rights of action that the law concedes to enterprises of that class."
>
> Record, p. 748.

The contention existing between a sovereign State on the one hand and a *quasi* public corporation on the other, in reference to a public franchise which had been granted by Act of Congress, and had been forfeited by Act of Congress, and the entire property of

which *quasi* public corporation had been confiscated by Act of Congress, would seem to be a contention of a public nature.

Upon this general question Judge Goff in the Circuit Court says:

> "I think that the submission was in the nature of a public contention, that the compromise and adjustment of the same through the medium of the Commissioners was based on a public law, an act of the Congress of the Republic of Colombia, and that, therefore, under the well-established rule applicable to such controversies, the decision of the majority will conclude the minority, and their act will be the judgment of the whole number appointed. The dispute was, at least, brought to an issue by an act of the Congress of the Republic of Colombia, by which the franchise of the railway claimed by the Cauca Company was, in effect, forfeited; the submission was evidently the result of the friendly suggestions emanating from the Secretary of State of the United States and conveyed to the Government of the Republic of Colombia through the Minister of the United States residing at Bogota; the third member of the Commission was chosen not by the parties nor by the Commissioners appointed by them, but by the representatives of the Governments of the Republic of Colombia and of the United States; the original concession to Cherry recognized the enterprise he was authorized to carry out to be of public utility, and conceded to him all the rights usual under such circumstances."
>
> Record, p. 1296.

In addition to the above summary of the facts showing conclusively the public nature of the contention, we might call the Court's attention to a point which Judge Goff apparently deemed unnecessary to refer to. In the Convention by which the Board is constituted the arbiters are designated a "Commission." The

authorities seem to make a clear distinction between arbitrators and commissioners.

Boston, etc., Co. vs. Gray, 6 Met., 131-173.

Anderson distinguishes as follows:

> "Arbitrator—A private extraordinary judge chosen by the parties who have a matter in dispute, and invested with power to decide the same."
>
> Anderson Law Dic., p. 71.

> "Commission—A body or board of persons entrusted with the performance of some public service or duty."
>
> Id., p. 210.
>
> See also Bouvier and Black.

The fact that the members of the board were designated Commissioners and not arbitrators seems of itself to fix their character as public officials, and the public character of the matter submitted.

2. Coming now to the second reason assigned by us, why the majority had power to award:

By virtue of the Convention the Commission was authorized to

> "determine the procedure to be followed in the exercise of the powers conferred upon it both *as to its own acts* as well as to the proceedings of the parties themselves."
>
> Convention, Article V., Rec., p. 60.

One of "its own acts," and its one important and final act, was to fix the indemnity. An essential element in the "procedure" by which this indemnity should be fixed, was the *method* of fixing it. The order of testimony and the deliberations preceding the final decision were no more a part of the procedure than the method of reaching the final result. And how was this method determined? At the very outset the question as to what vote should constitute an *act* of the Commission was settled without dissent.

"Mr. Stine: All decisions to be by a majority vote. Mr. Cisneros agreed to this on behalf of the government, *and it was resolved* that all differences of opinion be settled by a majority vote, and that such decisions shall be final."

Rec., pp. 89–90.

3. Finally, we submit, that the majority had power to award because such was the intention of the parties at the time the Convention was entered into.

If it can be inferred from the agreement of submission that the parties intended the vote of a majority to govern, an award made by them will be binding, even in the case of a purely private matter.

Hobson vs. McArthur, 16 Pet., 182.

In the case at bar, that such was the intention of the parties is clearly inferable from, (*a*) The language of Law 41 and of the Convention, and the personnel of the Commission; (*b*) The acts of the parties during the proceedings before the Commission.

(*a*)

The language of Law 41 *and the personnel of the Commission.*

Law 41 of 1896 "fully empowered" the Executive to "equitably compromise" "the questions of difference"; and provided as a condition thereto that the grantee should deliver over all the property in question to the Government. It provided absolutely no other method for settling the existing differences between the Government and the company except by the equitable compromise contemplated in the Act. Such an equitable compromise was made by the Convention, and in view of the premises it was clearly the desire and intention of the parties that the award thereunder should be final, complete, absolute and effective.

But the character of the Commissioners was such as to render it

absolutely necessary, in order that a conclusion might be reached, that an award concurred in by a majority should be the award of the whole Commission. As was said by Judge Goff in his opinion:

> "Was not the Commissioner selected by the Secretary of State of the United States, and the Minister resident of the Republic of Colombia, intended to be an umpire, to cast the deciding vote and determine all matters of difference between the Commissioners selected by the parties to the convention? It seems to me that such was the intention. If it was otherwise, surely the language selected was peculiarly unfortunate. A unanimous decision was not required in express words, and in a case of this character it should not be implied. It was certainly the wish of the parties that the arbitration should be conclusive, effective and final. The Cauca Company, in consideration of the submission, surrendered the railway and the property connected therewith to the Republic of Colombia, and the latter, in order to secure such possession, paid $200,000 in cash, and agreed to pay such further sum as the Commission should award, it being conceded that there should be no appeal from the result. The Commissioners selected by the parties to the agreement were avowedly favorable to the contentions of those respectively designating them, but the third member, Mr. Haupt, was disinterested and impartial. Under such circumstances unanimity of action was hardly possible and could not reasonably have been expected."
>
> Record, p. 1295.

This reasoning is not only unquestionably sound in point of principle, but is supported by the opinion in *Hobson vs. McArthur*, 16 Peters, 182. In that case there was an agreement to refer the disputed value of certain land to the arbitrament of two persons, one to be chosen by each party; and the agreement provided that if the two could not agree, they should choose a third who should

agree on the value of the land. It became necessary to choose the third person; and an award made by only a majority was held valid and binding. In delivering the opinion of the United States Supreme Court Mr. Justice Thompson said:

> "It has been argued, that this being a delegation of power to the three, for a mere private purpose, all must agree, or the authority has not been pursued. This may be admitted to be the rule, where the original delegation of the power is to the three, without any other provision on the subject. *But in construing this agreement, we must look at what was the obvious intention of the parties.* The parties clearly intended that the valuation should at all events be made. A third man was not to be called in unless the two disagreed; and it is an unreasonable construction of this agreement that it was so framed that it not only might fail to accomplish the very object intended, but that in all probability it must fail and become entirely nugatory, as the third man was not to be called until the two had disagreed. *Upon the construction of the agreement that the three must unite in the valuation, the office to be performed by the third man was to persuade the other two to agree with him. This could never have been the understanding of the parties.* It is a more reasonable construction to consider the third man in the character of an umpire to decide between the two that should disagree. This would insure the accomplishment of the object the parties had in view. But a contrary construction would most likely defeat that object."
>
> P. 192.

Directly in line with this decision is the case of *Gas Company vs. Wheeling:*

In that case the Wheeling Gas Company had a special charter from the State Legislature to light the city. By the charter it was provided that at the expiration of a certain period the city might

have the right to purchase the plant of the company. The purchase price was to be such sum as the City Council and directors of the company should agree upon. In case of their failure to agree, the same was to be fixed by the award of three persons, to be chosen, one by the company, one by the city, and one by the two thus chosen. Two of the persons thus chosen made an award, and the third expressly dissented therefrom.

The Court intimated that the award might be sustained upon the ground that

> "the public had some interest, and was and is concerned, to some extent in said purchase and award, and if that is correct, then, according to some of the authorities I have cited, the award agreed to and signed in this case by two of the arbitrators is valid, although the third arbitrator dissented."

But the decision was not put upon that ground. The Court said it was manifest (1) that the city should have an absolute right to purchase the plant of the Gas Company. (2) That if the Council and Company failed to agree as to price, such price should be fixed, *at all events*, by the arbitrators. (3) That the remedy by arbitration should be complete and effective. And, therefore (4), that it was not essential to the validity of the award that it should be unanimous.

The Court said:

> "It would be a discreditable reflection upon the wisdom and foresight of the legislature to suppose that it had given the council of the city an absolute right to purchase the gas works, property, etc., in their discretion, at their reasonable value, * * * * * and had provided specifically but two modes or remedies by which the price and terms of the purchase was to be fixed, ascertained and determined, neither of which was reasonably certain; and either of which could easily be

defeated by the act of the plaintiff. It was not reasonably certain that the council and the plaintiff's directors could or would agree upon the price or terms of the purchase; and while it was probable that three persons chosen in the manner specified by the seventeenth section might agree, still there was and could be no reasonable certainty or assurance that they would all agree upon the terms and price of the purchase, and make and sign an award accordingly; but it was not only probable, but reasonably certain that a majority of the arbitrators could and would agree if they all acted. In the case of all written laws it is the intent of the lawgiver that is to be enforced." * * * * * * * * * * * *

* * * * * "When we consider the object and purpose of the legislature, as well as its importance, in authorizing an absolute right of purchase of plaintiff's gas works and property, as provided in said seventeenth section, it seems to me to so construe that section as to require all three of the arbitrators to sign the award fixing the price and terms of purchase, to make it valid, would be absurd and unreasonable, and would defeat the object of the section."

Wheeling Gas Company vs. Wheeling, 8 W. Va., 320.

(*b*).

The acts of the parties during the pro dings before the Commission.

The original intention of the parties is also shown by their conduct.

At the second session the question as to what vote should constitute an act of the Commission, was raised and settled.

"Mr. Stone: All decisions to be by a majority vote. Mr. Cisneros agreed to this on behalf of the Government, and *it was resolved* that all differences of opinion be settled by a majority vote, and that such decisions shall be final."

Rec., p. 80.

At the next session (third)

> "Mr. Pena asked the chairman how items in dispute were to be settled by the Commission, and it was resolved that, in the case of disagreement between the members of the Commission, the chairman shall decide the question at issue."
>
> Rec., p. 98.

And thereafter no further reference was made to the question. All matters in dispute were settled on that basis without any objection thereto. In fact not until the institution of suit did Mr. Cisneros or Mr. Pena or anyone on behalf of the Government raise any question as to the propriety and correctness of that form of procedure. In the joint letter of Rengifo and Cisneros to to Secretary of the Treasury, at Bogata, (Record, p. 1249) *ultra vires*, fraud and mistake are suggested as grounds for impeaching the award, but this one is nowhere mentioned.

The aforegoing facts, we submit, are by themselves conclusive evidence of the original intention of the Government and its understanding throughout, that an award made by a majority should be binding.

Pena's Withdrawal Did Not Affect the Power of the Majority to Award.

Appellant contends, however, that conceding a power in the majority to decide all questions submitted and to make an award, they were deprived of this power by the withdrawal of Pena: and this contention is based upon the language of Article VI of the Convention, which is as follows:

> "Art. VI. Should any of the members of the Commission decline or resign the charge, or cease to act for any reason, the proceedings of the former shall not be thereby invalidated, but its integrity shall be restored by new appointment, to be made by the party naming the

missing member within thirty days, reckoned from that on which such default occurs. Should such party not comply with said obligation the Secretary of State of the United States of America and the Minister of Colombia in Washington shall by common accord proceed to name the person who shall fill the vacancy."

Preliminary to a discussion of this point let us briefly review the facts connected with Pena's withdrawal.

The Commission had held thirty-four sessions at all of which Mr. Pena had been present. He had listened to all of the testimony, heard all of the arguments and participated in all of the deliberations. The remaining Commissioners had had the benefit of his advice but had expressly committed themselves in favor of awarding the items which they subsequently did. Nothing remained to be done, therefore, after the thirty-fourth session but the mere formal execution of the award that had been already decided upon. The thirty-fourth session was adjourned on October 19th, and the thirty-fifth session held pursuant to adjournment on October 22nd. At this session Mr. Pena did not appear but transmitted to the Commission a copy of a letter which purported to be a letter of resignation to his Government dated October 22nd. An adjournment was ordered until the afternoon and Pena notified to appear. This he refused to do and the remaining Commissioners thereupon proceeded with the purely formal work of executing the award.

Legal Effect of Pena's Act.

Such a withdrawal, we contend, did not deprive the majority of their power to make an award, for two reasons:—

1. The mere writing of his letter of resignation did not create a vacancy in the Commission.

2. If it did create a vacancy, it was at a time when his membership in the Commission had become immaterial.

1. There is nothing in the record to show that Pena's resignation was ever forwarded to his principal and it is plain, therefore, both on authority and principle that it was ineffective.

The common law rule that a resignation to be effective must be accepted is stated by the Court in the case of *People vs. Board of Police*, 26 Barbour, 487, 501–502, in the following language:

> "Whatever may be the manner by which the incumbent of an office indicates his intention of resigning or abdicating it, whether by acts inconsistent with the retention of the office or by a formal renunciation of it, it is never consummated—he is never legally out of office—*until his resignation is accepted*, either expressly or by the appointment of another in his place. Otherwise an unworthy person, guilty of the most flagrant violation of his duty, could by a voluntary resignation, in many cases escape a trial and the deserved ignominy of a dismissal. In the case of *Rex vs. The Mayor of Ripon* (2 Salkeld, 433) the mere declaration by an alderman that he would hold the place no longer was a good resignation only because the corporation accepted it and chose another in his place; and, until such election, it was declared that he had power to waive his resignation but not afterwards."

In the case of *Edwards vs. The United States*, 13 Otto, 471, this Honorable Court makes a full review of the authorities bearing on this point and adopts the rule as above stated; and reaffirms it in the case of *Thompson vs. The United States*, 13 Otto, 480.

On this point Judge Goff says:

> "But as a matter of fact was not Pena still a member of the Commission when the award was made? Did the mere writing of a letter of resignation, which, so far as the record shows, was never even forwarded to the party by whom he had been appointed, cause a vacancy to exist in the Commission? He could have recalled the

resignation, or the party to whom it was directed could have declined to accept it, in which event he could again have taken his place as a member of the Commission, and in fact he could have done that at any time after the writing of the letter and before its acceptance by the power that appointed him."

Record, p. 1296.

We submit that Pena was still a member of the Commission when the award was made.

2. But, as we have stated, his withdrawal did not deprive the majority of its power to award, because it took place at a time when his membership in the Commission had ceased to be material.

This is sustained by abundant authority.

Carpenter vs. Wood, 42 Mass., 409.
Dodge vs. Brennan, 59 N. H., 138.
Crofoot vs. Allen, 7 Wend., 494.
Dickerson vs. Rorke, 30 Pa. St., 390.
King vs. Grey, 31 Tex., 22.
Doyle vs. Patterson, 84 Va., 800.
Hobson vs. McArthur, 16 Peters, 182.
Savannah, etc., Ry. vs. Decker, 94 Ga., 149.
Scudder vs. Johnson, 5 Mo., 551.
Stringer vs. Toy, 33 W. Va., 86.
Maynard vs. Frederick, 7 Cush., 251.
Wetz vs. Tregellas, 82 Md., 351.
Ex parte Rogers, 7 Cow., 526.

The case last cited is in point. By statute, one canal commissioner and two appraisers constituted a board of appraisal, to assess damages in favor of private persons against the State, for damages to lands caused by overflow of dams. Such a claim was

duly presented to such board. They all convened, heard testimony, and separated without deciding. They subsequently met, and two of the appraisers decided to award a certain sum for the damage, but the other dissented therefrom, refused to act, and declared himself absent and not a member of the board.

The Court said:

> "These three persons, the canal commissioner and the two appraisers, constitute a judicial body, a tribunal appointed by law to act in a matter of public concern, in the decision of controversies, or causes of a certain character between individuals and the State."
>
> " * * * The commissioner, one of the three appraisers, dissents and declares himself absent, and not a member of the Board. He had assumed the trust delegated to him by the Legislature and had been actively engaged in its execution as a member for a long time. After a full investigation, he had, it is presumed, joined in carrying on the deliberations of the Board, from time to time, till the eve of the final decision. Can his simple declaration of absence at that point of time subvert his character as a member of the appraising body? We are warranted in saying his counsel had been bestowed, and that the other members had heard and appreciated his advice: because every officer is presumed to have done his duty. Such advice is the object of the rule which requires all to associate; but, at the same time, allows a majority to decide. After so full a compliance with the spirit of the rule we cannot admit that this desertion of the Board should have the effect to invalidate the assessment. It is no more, in effect, than a ceasing to confer further on the question—a point to which every discussion must come when the arguments for and against are exhausted. *The actual absence of the dissenting member then ceases to be material*, unless his presence be required for formal or other purposes, by some positive provision or rule, much less in his declared absence; while he is, in

fact, present with every opportunity to contest the final decision."

Carpenter vs. Wood, 1 Met., 409, a leading case is almost directly in point.

In that case the submission was to three arbitrators or a majority of them. It also provided, that if one died, the two survivors should immediately choose a successor. All of the arbitrators met and heard the parties, but after consulting together at different times, and not agreeing on an award, one of them told the others he would not sit with them again. The other two then met and made an award, *without requesting the attendance of the third, or giving him notice.* The award was held valid, the Court saying:

> "At the first meeting, it appeared, upon the consultation after the hearing, that the referees could not agree. At a subsequent meeting, when all the referees were present, they concluded that they could not make a report *then;* and then it was that the chairman said he should do no more with the other referees about it, and he should not sit with them any more:
>
> "And afterwards, to wit: in September, he so informed the defendant. The award was afterwards made in February, by the majority, but without any new hearing of the parties, and without calling upon, or giving notice to the chairman, that the majority of the referees were about proceeding to make an award. And, it seems to us, that any such notice would have been a work of supererogation, if not of impertinence. What reason had the two referees to suppose that the third had altered his mind? He had already told the two that he would not sit with them again. He was not willing to award so much to the plaintiff as the others were. They had conferred together once and again, and the more they convened the more they disagreed; and such was their position when the chairman told the other referees that he would do no more about it with them."

It would seem from these two cases that a restoration might be necessary if it can be fairly presumed that the views of the majority could have been thereby altered; but that where the matter has been fully discussed and the majority irrevocably committed to a certain view a restoration is not necessary for the purely formal purpose of executing an award in conformity with that view.

It was manifestly not the intention of the parties to the Convention that a withdrawal such as Pena's should defeat the award. It was expressly declared that in case of the resignation of a member the "proceedings of the former (the Commission) shall not be thereby invalidated." When Pena attempted to resign, the Commission had held sessions extending over 203 days and had, therefore, but seven days more under the terms of the submission to complete the award; and the party whose member resigned had "thirty days" within which to make the restoration. It could not have been the intent that if such party refused or failed to reappoint a member for the purely formal purpose of entering his dissent to the award, the proceedings should be invalidated or that the remaining Commissioners might not award. If it were, then it gave to either party the power to defeat the purpose of the Convention. The party so actuated by dishonorable motives might take the chances of a favorable presentation of its case, at the same time involving all concerned in enormous expense, and at the last moment, or, as Pena significantly remarked to Cisneros, "when convenient," evade an adverse decision.

In view of the premises, we think that any intent or willingness on the part of the Government to appoint a substitute for Pena is immaterial. But there is absolutely no evidence in this case of any such intent or willingness. Rengifo's statement in the answer to the cross-bill is the only suggestion of this fact to be found in the record. But such statement (even if he knew of Appellant's

intent) does not constitute evidence when it has been denied by general replication. Appellant's failure to produce any testimony of its intent or willingness to restore indicates the absence of such intent; and as far as the previous acts of its agents could indicate, there was evidenced an express intent not to appoint a substitute for Pena.

Equitable Features of Pena's Act.

Thus far we have addressed ourselves only to the purely legal effect of Pena's withdrawal on the power of the majority to award. Upon equitable grounds also his action should not be allowed to defeat the award, for the following reasons:

1. His withdrawal was for the improper and fraudulent purpose of defeating the award, and his principal ought not in a court of equity derive any benefit from that fraudulent act.

2. The Company having surrendered to the Government its entire property and assets in consideration of the submission, its rights to this award should not be divested by Pena's refusal to act.

1. As to the first of these reasons:—

It might be fairly contended that Appellant participated in and passively, at least, assisted in bringing about the withdrawal of Pena for the express purpose of invalidating the work of the Commission. The construction of the Convention, by the majority of the Commissioners, was settled almost at the outset. This was communicated by cable to complainant at that time. (Cisneros' cable, Rec., p. 1180.) And in this cable Cisneros suggested and foreshadowed the final action of Appellant: "And in case of instructing our withdrawal, *it will be necessary that minister at Washington should not accept substitute. This would give rise to the formation of a new convention.*" Pena knew, Cisneros knew, Appellant's minister knew, and Appellant knew, on July 1, 1897, when this cable was sent, how the Commissioners had construed their powers under this Convention.

And they knew that this construction inevitably led to the award finally made. Yet knowing this the Appellant did not repudiate Cisneros' dishonest suggestion nor rebuke him for making it. But on the contrary, when Pena did resign in October, and Cisneros did attempt to withdraw Appellant at the same time, too late to restore the old Commission (had restoration been necessary), it cabled Cisneros that it approved the "steps that you have taken."

In an individual or a private corporation this action would be strongly suggestive of fraud.

But whether the Government did or did not participate in the withdrawal of Pena, his action was undoubtedly fraudulent. He had accepted, entered upon, and all but completed the performance of a special trust. He knew at the outset, and the Government knew, exactly what construction a majority of the Commission would put upon the Convention. And this construction logically and inevitably led to the award which was finally made. It was because of this construction that Pena withdrew. Notwithstanding this knowledge, and with his Government's consent, he continued to act with the Commission through 203 days of its sessions, and at the last moment, when it became a serious question as to the possibility of restoring the Commission, and regardless of the large and important interests involved, he attempted to disrupt the Commission and to destroy the results of its long and patient labors, by an attempted resignation. His purpose (whatever construction he may himself put upon it) is evident from the letter of Cisneros to the remaining Commissioners.

Cisneros' letter, Rec., p. 733.

It is conclusive that Pena believed that an award by a majority was valid. Otherwise he would not have withdrawn, but would have simply dissented from the final award. Then, if the Commission had exceeded their powers, the award would have been

invalid. It was his duty to remain. The conclusion is inevitable, that his withdrawal was to disrupt the Commission. And from any point of view, such action, in such a case, and at such a time, was fraudulent.

That the Complainant cannot benefit by its own fraud is elementary. That the principal is liable for the fraudulent action of an agent, committed in the course of the agency, is equally elementary. As a corollary to these two propositions it would seem to follow that complainant cannot set aside the award in the case at bar, when its reason therefor is based upon the fraudulent action of its agent, Pena.

Judge Goff says:

> "Clearly it was not the intention of the parties to the convention that the existence of the Commission should be destroyed by a resignation of the character of that presented by Commissioner Pena. It would be an impeachment of the common honesty of the parties to the agreement, and a travesty on their evidently honorable intentions, to hold that they designed that it should thus be in the power of one man—actuated by, to say the least, not commendable motives—to render worthless the work resulting from the expenditure of thousands of dollars and months of careful research, in an effort to amicably adjust an unfortunate controversy, that was rapidly reaching the point of embarrassment because of its national and diplomatic character. The testimony forces me to the conclusion that Commissioner Pena's only motive in withdrawing from the Commission was to prevent, if possible, a conclusion from being reached, or to render the award invalid, should one be made. This conduct—keeping in view all the circumstances surrounding him and the Commission, of which he was still a member—was not only reprehensible in character, but was fraudulent in its tendencies. He represented

the complainant, as did Cisneros, who advised him to pursue the course he did, and while I do not find that the complainant advised such action, still *I hold that it would be unconscionable to allow the party, whose agents thus deported themselves, to effectuate by the decree of a court of equity the wrong intended to be accomplished by such improper conduct.*

"If the award, which had virtually been agreed upon before Commissioner Pena withdrew, was composed of items not included in the submission, then he should have entered his dissent and have relied upon the proper tribunal, the assistance of which would have been easily obtained, for the purpose of declaring the invalidity of the finding."

Rec., p. 1297.

2. Coming now to the second reason:—

By the terms of Law 14 of 1896, the Government made the following condition precedent to any settlement:

> "*In any event, the condition of the friendly settlement shall be the renunciation* on the part of the grantee or his representative, *of the franchise granted, and the consequent and immediate delivery of the railroad,* and all its fixed and rolling stock, buildings, tools and other appurtenances."

In other words, the Government, after its virtual act of confiscation, insisted as a condition precedent to any reimbursement of the resulting damages to the company, that the latter should surrender absolutely its property and assets. The Government forcibly appropriated the entire fruits of the company's enterprise, and then submitted to others what it should pay for what it had taken.

Even in the case of the arbitration of a purely private matter, the rule requiring unanimity is not enforced when injustice and the divestment of the rights of either party will result. In such cases the failure of arbitrators to agree ought to leave the parties in *statu quo*. The parties ought still to have the ordinary remedies.

But in the case at bar, the inadequacy of such remedies is clear. Before the surrender of the Company, of all its rights and property it was in a position to protect itself, aided as it was by the State Department at Washington. In consideration of the surrender of its valuable franchise and property, it was given an arbitration. To brush aside and destroy the award of the Commission upon the technical ground advanced by the Appellant would be to leave the Company a naked claimant, with empty hands, and with no means of enforcing its demands, excepting in a foreign and unfriendly court. This it had the right to do, when our State Department interfered, but this interference and the reasons therefor indicate how little confidence the Company and our own Government had in the possibility of obtaining justice in ary Colombian forum.

The Government, upon its part, although seeking to set aside the award because of the action of its own Commissioner, and through no fault of the Company, makes absolutely no offer or tender to put the defendant in *statu quo*. No offer of a new Commission, and no tender of the property and assets of the Company is made.

He who seeks equity must do equity.

Should, therefore, a forced interpretation of the terms of the Convention prevail in a court of equity, when its application would be so unreasonable and unjust in its results?

Even in a court of law the rule of unanimity has been disregarded where rights had vested under a contract of arbitration. In an early Massachusetts case the award of a majority was sustained, although in an ordinary arbitration this would have been insufficient.

> "In a case like the present, if it appears that the plaintiff had done all in his power to procure an award fixing the amount to be paid to him, in pursuance of the terms of the contract, we do not think that the act of any one of the persons thus selected as arbitrators, in refusing

to concur with his associates in fixing the sum to be paid, should operate to divest the rights of the plaintiff arising under this contract."

Phippin vs. Stickney, 3 Metc. (Mass.), 384.

II.

THE PORTION OF THE AWARD CONFIRMED BY THE COURT BELOW IS NOT OBJECTIONABLE AS BEING A DEPARTURE FROM THE SCOPE OF THE SUBMISSION.

The Government's contention before the Commission and in the Lower Courts was, that the clear intent of the submission was to limit the award to the mere value of the physical structure of the railway.

It may be stated as a fundamental principle that the presumption is in favor of the award, and to avoid it the party complaining must clearly show that the authority granted has been exceeded. When parties to a dispute have appointed a special tribunal for the final settlement of their controversy it is but sound policy for courts to uphold the result of its work by every reasonable intendment.

Morse on Awards, p. 179.

A.

THE SCOPE OF THE SUBMISSION WAS A QUESTION FOR THE COMMISSION TO DECIDE.

We do not dispute the elemental principle that in the case of a submission, clear and definite as to its scope, an award as to matters which are plainly not included therein is void *pro tanto*. But we contend that where a submission is ambiguous or for any other reason requires to be interpreted by the arbitrators, it is within the

authority of the arbitrators to decide as to its true meaning. The facts of the case at bar afford a convincing argument in support of this principle. The agreement of submission was in Spanish and the clear intention of the parties was that the proceedings thereunder for the fixing of the indemnity should be conducted in English. An essential prerequisite to the main inquiry was, therefore, the ascertainment of the meaning of the submission in the latter tongue. To deny the Commission the power to do this, would be to deprive them of the power to award at all and consequently to make the submission a nullity. As to what matters are by implication included in the authority of an arbitrator Mr. Justice Story lays down the rule that unless there is a reservation made in the submission, "the parties are presumed to agree that everything both as to law and fact, which is necessary to the ultimate decision is included in the authority of the referees."

Kleine vs. Catara, 2 Gallison, 69–70.

In the present case it was "necessary to the ultimate decision" that the Commissioners should ascertain the English equivalent of the Spanish submission. At its first session the Commission called for translations thereof, and one was submitted by the Government which was objected to by the Company as being incorrect. Thereupon a controversy arose as to the meaning of certain words, "*costear*," "*construccion*" and "*obras y trabajos*," used in defining the scope of the submission. The testimony of Spanish scholars was taken, who differed widely and fundamentally as to the meaning of these words, which it appeared had a technical meaning when used as they were in connection with a railroad or engineering enterprise. To explain the ambiguity thus presented and to ascertain the sense in which the parties intended to use these words the Commission then received evidence of the circumstances existing at the time the agreement was entered into.

B.

UPON THE EVIDENCE BEFORE IT THE DECISION OF THE COMMISSION AS TO THE INTENT OF THE SUBMISSION WAS CLEARLY CORRECT.

We hardly deem it necessary to go exhaustively into this evidence. Its conclusive character is indicated by the fact that Appellant's counsel has refrained from commenting thereon, resorting to the contention that it should not be considered by the Court in ruling upon the intent of the submission,—a contention which we will hereinafter show is utterly untenable. However, as our position is that of clearly justifying the construction given to the convention by the Commission as to the general scope of its powers, we will refer briefly to this evidence, taking up first,

(1)

The circumstances existing at the time the agreement was made.

An analysis of this evidence leaves no doubt as to the intent of the parties to include in the indemnity every legitimate expenditure in connection with the enterprise.

The items of the award as confirmed by the lower Courts are of four general classes:

(*a*) Actual cost of physical construction in Colombia.

(*b*) Regular salaries and traveling expenses of the company's president and secretary, and expenses New York office.

(*c*) Extra compensation paid by company to its deceased president's estate, and its secretary, for extraordinary services rendered necessary by the alleged forfeiture.

(*d*) Original cost to company of the concession.

There is absolutely no dispute as to the accuracy or correctness of any of these items, or that they were paid, or are valid debts of the company. The only question is as to their admissibility under the Convention.

Complainant admits item (*a*), but disputes the remaining items.

A brief recital of the facts, occurring between the time of the attempted forfeiture, and the making of the Convention, indicates that all of the foregoing items were necessarily included in the submission.

At the beginning of the negotiations, and previous to the contemplated surrender of the railway, the character and scope of the company's claim for compensation was made clear and communicated to complainant by Mr. Cherry, on April 18th, 1895.

Record, p. 1219, Exhibit 86.

The American minister at Bogata, under instructions from the State Department at Washington, became a party to these negotiations in May, 1895.

The following facts as preliminary, and leading up to the execution of the Convention, appear to be well established.

(1.) That the original Cherry contract for the construction of the railway, contemplated and permitted the ownership and conduct of the enterprise by a foreign company, and permitted such company to fix its domicile in any city in Europe or America.

Record, p. 756, Arts. 34 and 35.

(2.) That an incomplete itemized claim of the company, amounting to about $800,000 was known and presented to complainant, during the preliminary negotiations.

Id., pp. 261, 642.

(3.) That at the same time, the agreement to pay Mr. Cherry $135,000 for the assignment of the concession, was recorded in complainant's archives in Bogata, and

> "was well known to constitute one of the items necessarily incidental to the construction of the railway, and for which the company is legally liable."

Id., p. 657.

(4.) That at the same time President Caro had in his possession the detailed items of the cost of the actual local physical construction of the railway, amounting to something over $200,000.

Id., p. 640.

(5.) That the actual cost of the local, physical construction must also have been known to Messrs. Cherry and Schramme at this time, since the company's figures thereon and those of Cisneros were almost identical.

Id., pp. 614–5.

(6.) That the Minister of Hacienda insisted upon a settlement, on the basis of an expert valuation of the cost of the actual, local, physical construction of the railway, and that this was absolutely declined by the company.

Id., pp. 263, 278.

(7.) That the Minister of Hacienda refused to execute the Convention, because it was more liberal to the company than his plan of settlement, and was thereupon forced to resign from the cabinet. That his plan of settlement was practically identical with that which complainant now contends is embodied in the Convention.

Id., pp. 277–8.

(8.) That complainant's executive did not, during these negotiations, maintain complainant's present limited view of its liability. This is evident from: (*a*) His letter to McKinney (R., p. 787). (*b*) His declarations to McKinney (R., pp. 261–2, 274).

(*a*) *His letter to McKinney.* Referring to company's claim for item (*c*) (*ante*), President Caro says:

> "This indemnity * * * cannot concede, not on account of its amount, but because such concession on the part of the

Government would be tantamount to a declaration that the law had caused damage, and because it would prejudge against the Government the question *which is to be submitted to arbitration.*"

At this point we might refer to Appellant's contention that the Commission erred in awarding item (c), being $29,200 paid to Cherry and Schramme for extra services in their trip to Bogata. In this letter to McKinney, just quoted from, President Caro admits that Cherry laid before him a claim of $30,000 for these services; and this was before the Convention was executed.

(b) *His declaration to McKinney.*

"He said to me in reply to what I had said, that he wanted the examination of all the books, vouchers, and papers, and everything of the Cauca Company—everything that could be found about their business—to be before the Commission, and he said his desire was *that the company should receive back every dollar that they had expended*; that was his statement to me—that it was his desire that they should receive back every dollar they had expended; he had no desire *that the company should lose one dollar.*"

Id., p. 262.

During this conversation Mr. McKinney advised President Caro to settle on the basis of a $600,000 cash payment, rather than submit the matter to arbitration, for he said:

"If you go into their books and accounts, I am sure it will cost at least $800,000. *The President replied that he had no doubt that I was correct*; but, if he were to settle by means of the payment of a gross sum, the probability would be that it would cost less than if he appointed a commission to examine the books and decide to what extent they were entitled to indemnification, but in the latter case, the people could not find fault with him.

Therefore, he preferred a settlement in that way in order to satisfy the feeling of the Colombian people."

Id., pp. 261–2.

It is submitted, therefore, on this branch of the argument and from the foregoing recital of facts that if the parties to the Convention had therein limited the inquiry to a mere ascertainment of the cost of physical construction in Colombia:

(1.) That there would have been no necessity for demanding the resignation of the Minister of Hacienda.

(2.) That the elaborate machinery of this Commission, required to meet in New York, to examine the "books and accounts" of the company, and to consume 210 days in its inquiries, would have been useless.

(3.) That President Caro would not have admitted the propriety of submitting to arbitration, so impertinent an expense as the $30,000 item for extra compensation for trip to Bogata.

(4.) That, knowing from the Cisneros estimate that the actual, local cost of physical construction, was but little more than $200,000, he would not have admitted the possibility of the award exceeding $600,000.

(5.) That he would not have declared, at the execution of the Convention, that it was complainant's intention that the Company should receive every dollar it had honestly and legitimately expended in the enterprise.

(2)

Interpretations by Spanish scholars before the Commission.

We believe that it would needlessly encumber the brief at this point to refer to all the testimony of this character. In an appendix to the brief (p. 99) it has been abstracted for purposes of reference, which will show its vast preponderance in favor of the

Company's contention. At this juncture we shall refer only to statements of a few of these witnesses, principally those produced on behalf of the government, whose testimony, it would seem, fully justifies the inclusion in the award of the items affirmed by the lower courts.

Ponce de Leon (Company's witness), an expert Spanish lawyer, testified that the contemplated indemnity included :

> "Every kind of legitimate expense made in the enterprise and by the company."
>
> Id., p. 566.

It included foreign as well as local administration expenses.

Id., pp. 511–2, 615, 568, 629.

It included traveling expenses of the officers on the company's business.

Id., p. 568.

It included the cost of the concession.

Id., p. 569.

J. S. Elliott (neutral witness), an expert engineer, and a Spanish scholar, considered that the company was to be indemnified for "all charges and all expenses."

Id., p. 805.

The indemnity included

> "Administration charges, such as possible office rent, clerk hire, attorney's fees, etc., in New York, or any other foreign place."
>
> Id.

Emilio del Monte (neutral witness), an expert engineer and Spanish scholar, said :

> "In a word, to the works should be charged, the ordi-

nary expenses relating to laborers, *directors of the work*, and materials, and besides, *those that appertain to its management, as well as the judicial and legal disbursements*, but not the expenses that refer to the issuance of loans, bonds, etc., for building the road."

Id., p. 806.

Wm. F. Shunk (neutral witness), Chief Engineer of the Bureau of American Republics, considered that construction

"should certainly include *cost of administration, and of general office expenses, wherever such offices may be located.* Customary precedent would add interest on the outlay during construction, and in making a preliminary estimate a percentage should be allowed for contingencies."

Id., p. 668.

Francisco J. Cisneros, Government's representative before the Commission, admitted that the expenses of construction included "hospital expenses."

Id., p. 487.

A. G. Menocal, (Government's witness), a civil engineer in the U. S. Navy, said that the indemnity would include the salary of a *general* manager, as distinguished from a *local* manager. Also that of a purchasing agent.

Id., pp. 529, 530.

Also traveling expenses.

Id., p. 532.

"If the Company is to be reimbursed for the actual expense incurred in the '*trabajos y obras*' of the road, the sum so paid should include * * * *the cost of administration*, such as *official salaries*, clerk hire, engineers and other employees necessary and actually applied to the construction of the railroad."

Id., p. 807.

Mr. Paul Fuller, (Government's witness), would include legal expenses "*in the examination of the title to the land, or work in relation to obtaining the right of way.*"

Id., p. 585.

Mr. Robertson: "Q. The duty of the Commission is to pass upon something which the Government is to get, and allow what its legitimate cost was?"

Mr. Fuller: "A. Yes, together with such preliminaries as I have referred to, and legal expenses in securing the right of way, *the ownership of the property necessary for the railroad*, if that was acquired and turned over to the Government."

"Q. Supposing the land belonged to the Government?"

"A. Then it has no relevancy to this Commission."

Id., p. 587.

It is to be noted in this connection:

1. That the concession was property.

2. That it was necessary for the construction of the railroad.

3. That it did not belong to the Government, but had been purchased and was owned by the company.

4. That it was turned over to the Government under the Convention.

M. P. Carter, (Government's witness), would include clerk hire in New York, in the indemnity.

Id., p. 419.

He would also include as construction expenses, "administration, a bookkeeper and expenses for offices, traveling expenses, assistants, and after that I would allow and add a liberal percentage of that."

Id., p. 464.

Charles F. Adams, (Government's witness), states the proper

indemnity broadly to be, "*The cost of the things which the company surrendered.*"

Id., p. 607.

> "*The Chairman:* In case the company was not paid for all cost of producing that effect on the ground, would you regard that as a just indemnity, all the legitimate and necessary cost or expenditures—under that article?"
>
> "A. No, I think that it calls for all the cost of producing that effect."
>
> Id., p. 609.

Mr. Adams thereafter, seems to have assumed that the Convention contemplated a purchase of the railway by the Government at its actual present value, and not an indemnity to the company for the actual cost of producing that railway.

However, in making an estimate for the actual cost of construction he would include: "*Land damages*, engineering, superintendence, *offices of the company, stationery, interest, rents, printing, law expenses*, and other incidentals."

Id., p. 610.

It would seem, therefore, that excluding the testimony of the Company's witnesses, and also excluding the testimony of those neutral witnesses to whom the Commissioners submitted the Convention, the confirmed items of the award are fully and conclusively justified by the testimony of the Government's witnesses alone.

(1.) *Salaries of Officers:*
By Menocal.

(2.) *Traveling expenses:*
By Menocal; Carter.

(3.) *Expenses New York office:*
By Carter; Adams.

(4.) *Incidentals:*
By Carter; Adams.

(5.) *Cost of Concession:*
By Fuller; Adams as "Land damages."

C.

IN DECIDING WHETHER OR NOT THE COMMISSION ERRED IN ITS INTERPRETATION OF THE SUBMISSION THE COURT MUST CONSIDER THE EVIDENCE LAID BEFORE THAT TRIBUNAL.

The Appellant seeks to exclude this evidence from consideration by the Court upon two grounds:

(1) That it is hearsay evidence of the facts to which it relates.

(2) That it was never offered in evidence by the defendant.

Appellant's counsel apparently misunderstood the use to which this evidence was put by the Court below. It was not considered by the Court, nor do we contend that it should be considered, as independent evidence in this cause of the facts to which it relates.

A question for the Commissioners to decide was as to the meaning of the Spanish submission. The question now presented to the Court is whether or not they correctly decided that question. It seems too clear to admit of argument that in passing upon this point the Court must consider the facts upon which the judgment of the Commissioners was based. And what are those facts? The testimony laid before the Commission, as shown by the record of its proceedings, which is filed in this cause by the Complainant. In other words, the Court makes use of this record not for the purpose of ascertaining what were the facts testified to, but for the purpose of ascertaining what was the testimony upon which the Commission based its decision.

> "'In order' says Lord Thurlow (*Knox vs. Symmonds*, 1 Ves. Jr. 369) 'to induce the Court to interfere, there must be something more than an error in judgment, such

> as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by the evidence; but in case of mistake, *it must be made out to the satisfaction of the arbitrator*, and that if it had not happened he should have made a different award.'"
>
> *Burchell & Marsh et al.*, 17 Howard, 344.

The fact that the mistake "must be made out to the satisfaction of the arbitrator" certainly involves the necessity of considering the evidence laid before him, in reaching a decision that he made a mistake. And in the present case, could it possibly be made out to the satisfaction of Professor Haupt that he erred in the construction he gave to the Convention, if the evidence which he patiently heard, during the many sessions of the Commission, and based his honest conviction upon, were utterly eliminated from the consideration of the question? We think not.

In view of what we have just said the complainant's second objection to the consideration of this evidence, viz.: that it was never offered in evidence by the defendant, becomes clearly immaterial. The only use which we seek to make of the record of the proceedings being to show upon what the Commissioners based their judgment which is here sought to be impeached, it is fully before the Court, inasmuch as it is filed and made part of the complainant's bill.

1 Daniels, Ch. Pl. and Pr., 838 (6 ed.).

(D)

THE EVIDENCE IN THIS CAUSE BEARING ON THE SCOPE OF THE SUBMISSION DOES NOT CLEARLY SHOW THAT THE COMMISSION ERRED IN ITS CONSTRUCTION THEREOF.

The evidence chiefly relied on by the Appellant to show error on the part of the Commission is the Fergusson translation of the Convention (Rec., p. 1207). Appellant's counsel contends that

this translation is the only evidence of the submission produced in this cause, and that it clearly shows the intent of the parties to limit the indemnity to the mere value of the physical structure. We dispute both of these assertions.

The documentary evidence of the submission is that in Spanish filed by the Complainant. This was the instrument which defined the powers of the Commissioners and which was before them for interpretation. The Fergusson translation was never executed by the contracting parties and was never before the Commission. Its only function in this cause is that of evidence that would show *to the satisfaction of the Commissioners* (to use the language of this Court in *Burchell vs. Marsh*, *supra*, p. 79) that they erred in their interpretation of the original instrument. And its use being so limited, it must, of course, be considered in connection with the evidence laid before the Commission and as of no greater weight than that evidence.

Conflict between Translations offered by Government.

It seems rather significant that in urging the adoption by the Court of the Fergusson translation to the exclusion of all the evidence before the Commission, the Appellant's counsel has disregarded the English translation filed by Appellant with the Bill of Complaint (Rec., p. 59). This translation which is identical with that made by Professor Amy, a Government's witness before the Commission, and which we may safely assume was made by him, differs in a vital point from the Fergusson translation, and this difference, we submit, establishes the ambiguity in the submission which Appellant's counsel claims does not exist. Article II of Amy's translation reads: "A just indemnity for *all the works constructed by the Company* during the time the undertaking has been in its charge." The same Article in Fergusson's translation

reads: "A just indemnity for *the works and labors which the Company may have executed* during the time in which the undertaking has been in its charge." The same difference appears in Article III of the respective translations. In his testimony before the Commission, Amy eliminated the word "*trabajos*" because he could not make sense of "works and labors constructed," thus ignoring an important word in the agreement.

In the Government translation originally submitted to the Commission (omitted by Miller from the record) the phrase is rendered "works of all kinds done." This was distinctly repudiated by Amy who testified that the correct expression should be "work of construction"; and in support of this view refers to the words immediately following "*obras y trabajos*", to wit, "*en la construccion de la empresada via ferrea*" which he says mean "in the construction of the said railway." (Rec., p. 547). As Professor Haupt indicates, therefore, the key to the obscure instrument is this word "construction" and of this he says:

> "Article III, 'defines the just and only indemnity,' which, according to Professor Amy (see testimony), is interpreted as follows: 'The Government of Colombia and the Company acknowledge beforehand as a just and only indemnity a sum which is an equivalent to that which the Company shall prove to have disbursed in the works executed by it in the *construction* of said railway, etc.' The language herein used being almost identically the same as that in Law 16 and Contract 20, to which reference is made in the Convention, leaves no doubt that the word "construction," as here used, must be taken in the same sense as in the preceding documents, and it must of necessity follow that whatever was granted in the first instance as being necessary for the construction of the said railway should be redeemed in the second as a part thereof. Any other conclusion would be a denial of justice and do *violence to the ordinary use of language.*"
>
> Rec., p. 652.

As Pena, the Government Commissioner, after admitting the difference of opinion as to the meaning of "*obras y trabajos,*" says: "if the specific words 'physical construction' had been used in the Convention no discussion would have ever occurred on the subject."

Rec., p. 695.

Now when we consider the three-sided conflict presented by Prof. Amy's testimony and the original Government translation and the Fergusson translation as to the rendition in English of "*obras y trabajos,*" which Appellant's counsel contends is the vital phrase, it must become obvious that the ambiguity of this is satisfactorily established by the Appellant's own evidence. But when we examine the other parts of the submission as translated by Fergusson (which translation as to these parts agrees in all respects with the other translations submitted) the intention of the parties is very plain not to limit the award to the bare cost of the physical structure.

The preamble of the submission refers to Law 41 of 1896 as a basis thereof, which is as follows:

> "In any event, the condition of the friendly settlement shall be the renunciation, on the part of the grantee or his representative, *of the franchise granted* and the consequent and immediate delivery of the railroad and all its fixed and rolling stock, buildings, tools, and other appurtenances."
>
> **Rec., p. 54.**

Complying with this condition the Company by Article II of the Convention surrendered to the Government its railroad and property connected therewith. And

> "In exchange the Government of Colombia will pay to the Company *a just indemnity for* the works and

labors which the Company may have executed during the time in which the undertaking has been in its charge."

Rec., p. 1208.

Complainant contends that a *just indemnity* for what the Company surrendered would be limited to the bare physical value of the things surrendered, when, as a matter of fact their cost was over treble in amount. This is at variance with all definitions of "indemnity." To indemnify is to save harmless, to reimburse, to make whole, to repay any damage sustained. A just indemnity for the surrender of a railroad and everything connected therewith can in no sense be limited to the value of the bare physical structure, but must include all legitimate expenses connected with the enterprise; or in other words its *cost*.

In the present case this would naturally include the cost of the concession. The concession was one of the things surrendered. The Cherry contract permitted a transfer of the concession to a foreign corporation. That concession was of great value, including not only a franchise, but also a partially completed and equipped railroad. A gratuitous transfer by Cherry could not have been reasonably contemplated. The Cherry contract also permitted the grantee of the concession to fix its domicile in any city in Europe or America. The business of that grantee was to build, equip and operate a railway in a wild, remote, tropical country, where almost all material and supply must be imported. That the indemnity for the cost, to the Company, of the "things surrendered" should *include* its minor office and administration expenses, salaries of inferior employees, etc., but should *exclude* its principal office, and general administration expenses, salaries and traveling expenses of its active, managing officials, and cost of the concession, without which it could do nothing, seems, under all the circumstances, utterly unreasonable and absurd.

But that this latter class of expenses were included in the scope

of the submission appears from Article V of the Convention. We quote from Judge Goff's opinion on this point:

> "By the fifth article of the convention, the Commission was authorized to fix the indemnity, *and in addition* it was to appraise the structures, works and materials referred to. To indemnify is to save harmless, to reimburse, to repay any damage sustained. If the Commission in ascertaining the indemnity had been limited to the actual local cost of the railway, why was it necessary to consider the books of the Cauca Company at New York, as also the documents that the Government of Columbia, as well as the Cauca Company, might present in support of their respective claims, and such as the Commission might demand."
>
> Rec., p. 1298.

We submit that the appellant has not discharged the burden the of producing evidence that *clearly* shows the Commission erred in in the construction it gave to the Convention. The evidence here reviewed not only does not countervail the evidence before the Commission, but of itself, we submit, sustains the conclusion reached by that tribunal as to the general scope of its powers.

III.

THE FACT THAT THE ITEMS OF THE AWARD WERE ASCERTAINED BY REFERENCE TO DISBURSEMENTS MADE BY THE COLOMBIAN CONSTUCTION AND IMPROVEMENT COMPANY DOES NOT INVALIDATE THE AWARD.

The other main error which the Appellant claims the Commissioners committed in making the award, was in ascertaining the items of the award by reference to the disbursements made by the Colombian Construction and Improvement Company. In our

judgment this objection is frivolous and not worthy of serious consideration. At the most it is a purely technical ground, and a Court of Equity will not entertain a technical ground for setting aside an award. But it is very plain from an examination of the proceedings before the Commissioners, that their reference to the disbursements of the Colombian Company as being the only true index of the amount of the indemnity they were to find for the Cauca Company, was perfectly proper.

Every disbursement made in the construction of a railway, by whomsoever made, represents a charge against the owner thereof, in the form of either money paid out or liability incurred; and the sum total of these disbursements represents the cost of the railway to the owner or what he has expended in constructing it. By virtue of being the assignee of the Concession, the Cauca Company was the owner of the railway property built thereunder. By the terms of the agreement of submission, it surrendered this railway property, and was to receive "in exchange" a "just indemnity" for what it had expended in the work of construction. It was, therefore, the clear intention of the parties that what might appear to be the actual disbursements in the construction of the railway, should be considered in ascertaining the amount of the indemnity.

In the course of the proceedings for the ascertainment of this indemnity, it was developed that the Cauca Company, as such, had not made a single disbursement in connection with the construction of the railway, but had incurred liabilities in the form of stock and bond issues, for the purpose of carrying out the enterprise. All the disbursements in construction appear to have been made by the Colombian Construction and Improvement Company, a company owning all the stock in the Cauca Company, promoted by the same people, and incorporated at the same time as the Cauca Company, and whose books of account showed that the two companies were practically identical.

Record, pp. 218, 808–818.

To the mind of a practical engineer the only inference to be drawn from such evidence, was that the relations between the two companies were such as usually exist between a railroad company and its construction company; which is, for the former to issue all the capital stock to the latter and to place to its credit as so much paid in on the stock, all disbursements made by it in the construction of the road. The books of the railroad company in such a case show its liabilities incurred in carrying out the enterprise in the form of so much stock issued. The books of the construction company, it being the one that keeps the construction accounts, show the disbursements made in construction and for which the railroad company becomes liable to it as for payments on the stock issued to it.

As a practical engineer, Professor Haupt was naturally familiar with this custom in carrying out railroad enterprises, and the facts brought out before him being consistent with the existence of such a relation between the two companies, he properly disregarded the liabilities of the Cauca Company in the form of stock and bonds issued, and considered the disbursements which the books of the Colombian Company showed had been made in the construction of the railway. Under the clause in the Convention (Art. V) requiring the Commission to examine all documents presented by the respective parties, and such that it should demand, the Commission acted properly in referring to the books of the Colombian Company. These books were the only documents that showed the disbursements in construction, and unless the Commission had resorted to them, it would have had no means of ascertaining any indemnity at all, and the intention of the parties to the Convention would have been defeated.

Appellant's counsel, however, contends that the Commissioners had no power to draw this inference as to the relations between the two Companies. This contention is without merit, for the settled rule that makes the arbitrator the judge of the admissibility

and *weight* of evidence (*Campbell vs. Western*, 3 Paige, 124; *Shaifer vs. Baker*, 38 Ga., 135; *Hooper vs. Taylor*, 39 Maine, 224; *Pike vs. Gage*, 9 Foster, 461) gives him power to draw inferences of fact. In the celebrated case of *Boston Water Power Company vs. Gray* (6 Metcalf, 131), Chief Justice Shaw says: "In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence, *and the inferences of fact to be drawn from it.*" 6 Metcalf, p. 165.

If the award can be set aside at all because the Commissioners drew this inference from the evidence before them, it can only be upon positive evidence which clearly shows that it was in fact erroneous. And it would certainly seem that the finding of the Commission on the point in question is entitled to the greatest respect, and should not be disturbed unless shown to be a palpable error by the most convincing evidence *aliunde*, because the particular matter was one peculiarly within the province of an engineer trained in and familiar with the methods of railroad construction, to decide.

Has the Appellant produced the requisite evidence to clearly show that this was an error on the part of the Commissioners? Has it discharged the burden of showing positively that the Colombian Construction and Improvement Company was *not in fact* the agent of the Cauca Company for the purpose of building the railway and whose expenditures in connection therewith would be a charge against the Cauca Company? On the contrary, the evidence adduced by the Appellant clearly tends to establish the existence of these relations between the two Companies.

See Complainant's Exhibits Nos. 5, 6, 7, 8.

Rec., pp. 37–49.

There can not be the slightest doubt that these relations *bona fide* existed, and that the Government evidently intended that the disbursements of the Construction Company should be considered in fixing the indemnity. The Convention itself expressly recites Mr. Cherry's power of attorney from the Cauca Company (Rec., p. 799) and that power of attorney refers to the contract of the Cauca Company with the Colombian Construction and Improvement Company. (Rec., p. 1227).

Upon this general question Judge Goff said:

> "I do not deem it essential to discuss the questions raised as to the relations existing between the Cauca Company and the Colombian Construction and Improvement Company, further than to say that it is plainly shown that they were such as usually exist between railroads and their construction companies, and also that *the conclusion is inevitable from the proceedings before the Commissioners that the complainant was advised fully of such relations before the Convention was signed, and evidently intended that all legitimate expenditures of the said Improvement Company should be considered by the Commission in ascertaining the indemnity it* was to find for the Cauca Company."
>
> Record, p. 1302.

IV.

THERE WAS NO FRAUD OR MISCONDUCT ON THE PART OF THE COMMISSIONERS HAUPT AND SCHRAMME.

In the Bill of Complaint several acts of fraud and misconduct are charged. At the hearing in the Lower Courts however, most of these charges were abandoned by counsel. The only one urged, which is not heretofore fully answered by us, being that of admitting evidence not strictly legal.

As a general rule arbitrators are not selected with a view to their learning in the law, and their infallibility to decide on the admissibility of evidence according to the rules of law. Accordingly, while the rejection of material testimony might be grounds for the disaffirmance of the award the admission of evidence logically bearing on a matter within the power of the arbitrator to decide, which though in the judgment of the Court is legally inadmissible would, we submit, be no reason for setting aside the award. Any other rule would make the Court an appellate tribunal, and defeat the main purpose of arbitration, which is to settle the controversy between the parties without the intervention of the regularly constituted tribunals.

We submit, however, that the testimony received by the Commissioners, which the Appellant's counsel claims was inadmissible, was perfectly competent in accordance with the rules of evidence. This testimony was as to the circumstances existing at the time the agreement of submission was made, in order to throw light upon the ambiguous language therein.

The authorities cited by Appellant's counsel in support of his contention that this evidence was improperly received, go no further than to establish the proposition that evidence of an antecedent verbal agreement is inadmissible to vary the plain terms of a written contract. It is obvious that this proposition has no application to the facts of this case. The submission was ambiguous, and to ascertain the true meaning thereof the Commissioners received such evidence as would place them in the same situation as that occupied by the parties when they entered into the contract. This was perfectly proper according to the rule of this Court.

In *Nash vs. Towne*, 5 Wall. 689, the Court says: (p. 699.)

> "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the sur-

rounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

In *Barreda vs. Silsbee* (21 Howard, 146) it was held that parol testimony of declarations and statements of the agents of a party to a charter-party made during the antecedent negotiations, was admissible to explain the meaning and purpose of provisions in the charter party.

An examination of the alleged incompetent testimony before the Commission will show, that it has reference to statements and events occurring during the negotiations leading up to the execution of the submission, or which were contemporaneous therewith.

V.

THE APPELLANT IS ESTOPPED FROM ASSERTING THAT THE AWARD WAS INVALID.

The conduct of Appellant's agents before the Commission we regard as fatal to its right to object to the award.

Morse says: "The general rule is that by appearing and proceeding before the arbitrators, after having obtained knowledge of the incompetency or irregularity, the party waives and loses his right to avail himself of this objection to the validity of the award. Silence operates as acquiescence or condonation. To proceed is to involve all concerned in loss of time and in expense, and also to take the chances of a favorable presentation of the case and a decision in his favor. The party will not be allowed, after putting himself and others in such a position, to

refuse to abide by a result which proves unsatisfactory to him."

Morse on Arbitration, pp. 171, 264.

2 *Am. & Eng. Encycl. of Law*, p. 727 (2d ed.)

This principle is also applicable to a departure from the scope of the submission.

Morse, p. 175.

Is not the language of Mr. Morse clearly applicable to the actions of the Government's Representatives before the Commission?

At the third session, the majority gave a decision as to the scope of the submission, from which Pena dissented. During the next sessions, up to and including the eighth, the Commission heard testimony as to the Company's claim. During the course of this testimony, complainant apparently abandoned its contention, that the cost of construction was the sole question to be determined by the Commission. It introduced (upon cross-examination) a mass of testimony as to amount of cash received by Company from the Government, from traffic receipts, etc.; also disbursements for operating expenses, etc. Also amount of cash sent to Company's office in New York. Their evident purpose was to show that the Company had received more in the way of receipts from the Government guaranty, and operation, than it had expended in operation and construction.

At the ninth session, on June 19, 1897, complainant's counsel and representatives again returned to the question as to the scope of the submission. At this time they offered to the Commissioners the opinion of another counsel not connected with the case; which opinion indicated that the Commissioners had erred in their decision of this question, and, as stated by Mr. Robertson the Government's counsel, these counsel

"further advised that the *only proper* course for the Colombian representative, Mr. Cisneros, to pursue in this emergency will, in their judgment, be to ask for sufficient time to enable him to submit the present shape of the case to his principal, await the Government's definite instructions and be guided by them. In the event that his Government should waive the point that the tribunal is proceeding outside of the convention, then he will go ahead with the case and submit his proofs on the questions now at issue, and in the event that his Government should decline to proceed upon anything except that which had been provided for in the convention, *he would then indicate this position and refuse to proceed as regards these extraneous matters.*

Rec., p. 196.

Did the Government's representatives ever at any time in the course of proceedings "refuse to proceed as regards these extraneous matters," after they had been advised of the Government's attitude in respect thereof? Quite the contrary. They permitted the Company to go ahead with the evidence in support of its claim. They put on the Government's case in rebuttal. They attempted to prove by various witnesses the meaning of the disputed words in the Convention. They introduced a mass of testimony which had no relevancy except on the theory that the construction already given the Convention by the Commission, was correct. All of this consumed fifteen sessions, and incurred enormous expense.

This conduct was surely more than mere "silence" which "operates as an acquiescence or condonation." With full knowledge of the alleged irregularity in the proceedings of the Commission, and with full knowledge of the consequences of their act, the Government's representatives proceeded and involved "all concerned in loss of time and in expense," with the evident and

single purpose of taking "the chances of a favorable presentation of the case and a decision in" their "favor." This purpose is conclusively shown by Pena's remark to Cisneros when importuned by the latter to withdraw. He "always answered" that he "could take that step" when he "considered it *convenient*." He did not take this step until it became certain that the final decision would be adverse to his principal. We submit that his convenience came at too late a date to cure the waiver which, within the rule stated, the previous conduct of himself and Cisneros had created.

Such conduct in view of the advice given by the outside counsel, could have but one effect on the minds of the other parties to the proceedings; that is, to lead them to believe that the Government would accept the ultimate decision of the Commission as to the scope of the submission. That in fact such was their belief is clearly shown by minutes of the Commission, and the testimony of Prof. Haupt (Rec., p. 1269). If the real intention of the Government was not to abide by the ultimate decision of the Commission, its representatives were certainly guilty of a base and contemptible deception. And is this Court, as a court of equity, going to put its stamp of approval upon such conduct, by disaffirming the award? In the words of Judge Goff we contend

> "that it would be unconscionable to allow the party, whose agents thus deported themselves, to effectuate by the decree of a court of equity the wrong intended to be accomplished by such improper conduct."
>
> Rec., p. 1297.

CONCLUSION.

We believe that a careful analysis of the Appellant's case will show that its entire fabric is based upon a palpable misconception by counsel of the settled principles that should guide a court in determining the validity of an award. Briefly stated, the single proposition it involves would seem to be, that the burden is not upon the party assailing the award to clearly show error or excess of authority, but upon the party defending to show by positive evidence independent of that adduced before the arbitrator, that the award was clearly within the intent of the submission and, in the judgment of the Court, correct as regards every detail.

That such is the position taken by Appellant's counsel would seem plain from his seeking to exclude from the consideration of the Court, the evidence before the Commission which explained the ambiguity in the submission, and in his virtual contention that in order to defend the action of the Commission in ascertaining the items of the indemnity to the Cauca Company by reference to the disbursements of the Colombian Construction and Improvement Company, the defendant must show by affirmative evidence, that would exclude all possible doubt, and independent of the evidence before the Commission, the agency existing between these two companies for the construction of the railway.

We submit that such a proposition is hostile to the purpose of arbitration, and in contravention of the settled principles of law relating thereto. The purpose of arbitration is the settlement of a dispute without the intervention of the regularly constituted tribunals, by a tribunal of the parties' own selection, whose decision shall be final and unappealable. And it is resorted to at the present time largely because the questions involved are such as require a man of technical training or practical experience to properly pass upon them; his own information on matters germane to the issues being more valuable and conducing more

to the formation of a sound judgment thereon than evidence of these matters. While it may be true that the element of possible submission to a judicary is absent in the present case, it is nevertheless manifest that these considerations guided the high authorities in their selection of the Honorable Chairman of the Commission who was to act as umpire. The matters involved had reference to an engineering and railway enterprise, and no man was better equipped to form a sound and impartial judgment upon these matters than Professor Haupt. His technical learning, his experience, his intimate knowledge of affairs connected with his profession and his unimpeachable character are all fully attested by the honors conferred upon him by our Government. We believe that the real purpose of arbitration was never more forcibly exemplified than in the present case.

The principles that govern the disaffirmance of awards are well settled and follow logically from the purpose of arbitration. An award is entitled to much greater respect from the reviewing court than is a judgment of a lower court, and the burden is upon the party assailing it to show by clear and positive evidence that the authority has been exceeded or error committed. As stated by Mr. Justice Grier (*Burchell vs. Marsh, supra*, p. 79), the mistake must be made out "to the satisfaction of the arbitrator." So disinclined are courts to disturb an award that, as is said by Lord Eldon in *Wood vs. Griffith* (1 Swanston, 55) "If Judges so chosen erroneously decide a question of law, the Court will abide by that decision." The Court does not even occupy the position of an appellate tribunal.

The award in question comes to the Court not only with the legal presumption as to its validity, but with every presumption that should attach to it as being the judgment of a man preëminently fitted to render the same, and formed after seven months of careful, conscientious, intelligent investigation and deliberation.

That the railway actually cost the Company more than the

amount awarded, as well as the lives of its president and one of its civil engineers is unquestioned. That "indemnity" for the surrender of the railway should be limited to the mere value of its physical structure, is a proposition that is not supported by any definition of the word. That the Company would have accepted such limited reimbursement is contrary to the plainest principles of common sense. That its own Government would have permitted diplomatic intervention to cease at this point seems hardly possible. That the evident honorable intentions were that the submission should not be so restricted as to its scope is not only conclusively established by the testimony before the Commission, but appears from the submission as a whole.

In conclusion, it might not be out of place to briefly recur to the conduct of Pena and Cisneros before the Commission. The very apparent motives which prompted the conduct of Pena, so properly stigmatized by the court below, would seem to furnish a sufficient reason for the refusal of a court of equity to entertain the complainant's petition here. Irrespective of motive, however, the course of the Government's representatives after receiving and bringing to the attention of all parties, the advice of outside counsel as to the course they should pursue, would seem on the clearest principles of equity to estop the Government from now setting up that the award was a departure from the submission.

Upon the merits of the whole case we respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

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APPENDIX.

DIFFERENCES OF OPINION AMONG EXPERT WITNESSES.

As to meaning of obras y trabajos.

CARTER:

Trabajos means excavating merely, and embankments. *Obras*, practically everything else in way of physical structure.

Rec., p. 416.

Entire phrase is "limited purely and solely to physical work."

Id., p. 417.

"Revised definition." "I will include the physical work—and the mental labor also necessary for the conducting of that physical work."

Id., p. 418.

CISNEROS:

Obras means "structures."

Trabajos means "works and materials."

Phrase means simply "physical works."

Id., p. 489.

FULLER:

Obras means "material work and result."

Trabajos, "the scientific work necessary for the preparation," "all the *portfolio* work which is absolutely necessary from the beginning to the end of the construction."

Id., p. 593.

ADAMS:

Obras represents "concrete results."

Trabajos, "primary or necessary work done in attaining that result, but which, in itself, does not have a separate concrete result."

Id., p. 579.

DOUGHERTY:

No distinction between meaning of two words. Both mean same thing.

Id., p. 484.

MENACOL:

Trabajos is physical exertion to produce anything.

Obras is the finished product.

Id., p. 525–6.

Trabajos, "works in process of construction."

Obras, "structures or completed works."

Id., p. 807.

EASTON:

Is unable to give meaning in the connection used.

Id., p. 803.

RENNERT:

Is also unable to interpret.

Id., p. 803.

KAISER:

Trabajos, "work involving muscular exertion."

Obras, "work involving mental exertion, but also, completed works, buildings, etc., of every kind."

Id., p. 804.

ELLIOTT:

Trabajos "means work in full, everything completed."

Obras, not generally taken in broad sense of *trabajos*. Means a specific piece of work.

Id., p. 805.

DEL MONTE:

Obras, "generally signifies bridges, viaducts, culverts, drains, retaining walls and the stations, etc."

Trabajos, "embraces the preceding items, besides all the others that are made until the railroad is completely built."

Id., p. 806.

OLCOTT:

Obras means "a completed entity—everything."

Trabajos, the work put into these operations till completed; manual labor.

Id., p. 539.

AMY:

Obras, applies to structure itself.

Trabajos, the rough manual work done by the laborers, under the direction of overseers, with special reference to the preparation of the ground.

Id., p. 781.

OLCOTT, MESTRE AND GONZALES:

Obras, applies to that which is constructed above the surface of the ground.

Trabajos, refers to that which is worked in or from the ground.

Id., p. 779.

PONCE DE LEON:

Obras, is generic.

Trabajos, is specific.

Obras, means "everything done, either morally, mentally, physically or materially."

It is the "operation of making, constructing, forming, organizing, etc."

Trabajos means "every work done, whatever its nature may be."

"Used together they express everything; they give more force one to the other."

Id., p. 513 to 514.

As to What Indemnity Should Be.

PONCE DE LEON:

"In my opinion it means every kind of legitimate expenses made in the enterprise and by the Company."

Id., p. 566.

Includes foreign, as well as local administration expenses.

Id., p. 568, 511–2, 515, 629.

Includes traveling expenses of officers on Company's business.

Id., p. 568.

"The Company cannot be paid for all its 'work and labors' unless every item of expense to which the Company has been put, for the obligations, which it has incurred and still owes, have been paid to it."

Id., p. 628.

Includes cost of concession.

Includes discount on bonds issued.

Id., p. 569.

ELLIOTT:

All charges, and all expenses.

Id., p. 805.

Includes "Administration charges, such as possible office rent, clerk hire, attorneys' fees, etc., in New York, or any other foreign place."

Id., p. 806.

DEL MONTE:

Includes absolutely "all the money disbursed for building it, with the exception of those outlays that refer exclusively to the capital and the formation of the Company."

"In a word, to the works should be charged the ordinary expenses relating to laborers, *directors of the work* and materials, and *besides, those that appertain to its management, as well as the judicial and legal disbursements*, but not the expenses that refer to the issuance of loans, bonds, etc., for building the road."

Id., p. 806.

SHUNK:

Includes cost of administration, and general office expenses, wherever such offices are located.

Includes interest on outlay during construction.

Also contingencies.

Id., p. 668.

CISNEROS:

Includes administration expenses at Buenaventura, but not at New York.

Id., pp. 77, 487, 491.

Excludes official salaries, except when personally engaged on the ground on the work of construction.

Id., p. 491.

Includes hospital expenses.

Id., p. 487.

Includes all moneys "disbursed in every kind of work done by it (company) in the construction of said railway."

Id., p. 487.

MENACOL:

Includes salary of *general* manager, as distinguished from *local* manager.

Also purchasing agent.
Id., p. 529–530.

Also traveling expenses.
Id., p. 532.

Excludes legal expenses.
Id., p. 531.

FULLER:

Excludes medical supplies.
Id., p. 588.

Includes legal expense in examining title or obtaining right of way.
Id., p. 585–587.

Excludes cost of rebuilding bridges washed away.
Id., p. 590.

Excludes expense of procuring materials outside of Colombia.
Id., p. 585.

Includes cost of ownership of land necessary for railroad. But not, if land belonged to government.
Id., p. 587.

CARTER:

Includes clerk hire in New York.
Id., p. 419.

Includes expenses for bookkeeper, for offices, traveling and assistants. "And after that I would allow a liberal percentage of that."
Id., p. 464.

OLCOTT:

Excludes rebuilding of bridge swept away by flood.
Id., p. 540.

Excludes cost substituting heavy steel rails for old, light ones, on old road.

Id., p. 541–2.

AMY:

Includes, only, salaries of "officers on the ground."

Id., p. 548.

Excludes salaries of managing officers.

Id., p. 548.

ADAMS:

Includes "cost of things surrendered. All cost of producing the effect on the ground."

Id., pp. 607–609.

Includes "land damages, engineering, superintendence, officers of the company, stationery, interest, rents, printing, *law expenses* and other incidentals," *if building*, but not if *buying* the road.

Id., p. 610.

Excludes salaries of officers not directly engaged in construction work.

Id., p. 580.

KAISER:

Excludes all "administrative work or expenses."

Id., p. 805.

As to Necessity of Commission Going to South America to Personally Inspect Railroad.

The following experts considered it mandatory (all Government witnesses), viz.: Cisneros (Id., p. 490); Menacol (Id., p. 528); Olcott (Id., p. 540); Amy (Id., p. 551).

The following experts considered it not mandatory, but in discretion of Commission, viz.: Ponce de Leon (Com-

pany's witness, Id., p. 516); Fuller (Government witness, Id., pp. 587, 594 to 601).

Fuller thinks Commission may send experts.

Generally, as to Ambiguity of Submission.

DEL MONTE:

"*Los trabajos y obras*, referring to railroads, appears to me to be a form of expression improperly used," etc.

Rec., p. 806.

ELLIOTT:

Referring to the use of "*obra*" in connection with "*trabajos*."

"It does not strengthen *trabajos* here, but was probably put in for the same reason that lawyers invariably 'give, bequeath, assign, turn over,' and generally bedevil language so as to create trouble where otherwise none would exist."

Id., p. 805.

PONCE DE LEON:

Referring to the same two words:

"Used together they express everything; they give more force, one to the other."

Id., p. 514.

PENA:

Government's commissioner. Referring to the phrase "*en la construccion de la expresada via ferrea*," in Art. 3 of the Submission, and admitting the difference of opinion between parties and expert witnesses, as to whether the word "*construccion*" should be liberally or strictly construed, says: "if the specific words, 'physical construction' had been used in the Convention, no discussion would ever have occurred on the subject."

Id., p. 695.

The chairman aptly concludes that upon the meaning of the word "construction" depends the meaning of the entire contract.

Id., p. 651 *et seq.*

OLCOTT:

Intimates that a consideration of the original Cherry contract, might be necessary to a proper construction as to a portion of the indemnity under the arbitration agreement.

Id., pp. 540, 542.

AMY:

Says original Government translation of Art. II (see p. 695) as "works of all kind done," is wrong. Should be "work of construction."

Id., p. 547.

FULLER:

Translates: "Works and constructions executed by the Company."

Id., p. 584.